

U.S. DEPARTMENT OF COMMERCE
National Technical Information Service

PB-267 332

Transcript of CONTU Meeting Number 14 Held at Arlington Virginia on May 5, 1977

Nat'l Comm on New Technological Uses of Copyrighted Works

May 77

NATIONAL COMMISSION
on
NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS

FOURTEENTH MEETING

TRANSCRIPT OF PROCEEDINGS

Place: Crystal Mall Building No. 2
Arlington, Virginia
Date: May 5, 1977

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Phone: (202) 347-0224

BIBLIOGRAPHIC DATA SHEET	1. Report No. CONTU 77-0004	2.	3. Recipient's Accession No.
4. Title and Subtitle TRANSCRIPT CONTU MEETING NO. 14		5. Report Date May 5, 1977	
		6.	
7. Author(s) National Commission on New Technological Uses of Copyrighted Works (CONTU)		8. Performing Organization Rept. No.	
9. Performing Organization Name and Address National Commission on New Technological Uses of Copyrighted Works (CONTU) Washington, D.C. 20558		10. Project/Task/Work Unit No. Pub. L. 93-573	
		11. Contract/Grant No.	
12. Sponsoring Organization Name and Address SAME AS BOX #9		13. Type of Report & Period Covered transcript of meeting held May 5, 1977	
		14.	
15. Supplementary Notes The meeting featured Commission discussion on the CONTU Committee reports concerning			
16. Abstracts The meeting featured Commission discussion on the CONTU Committee reports concerning copyright protection for computer programming and for automated data bases. The Commissioners made suggestions for amending the Committee reports and agreed to circulate the amended versions along with dissenting and concurring comments by members of the Commission. The Photocopy Committee discussed a request for additional guidelines to interpret further terms in section 108 of the new copyright revision law; the Commission agreed to offer its good offices to this end.			
17. Key Words and Document Analysis. 17a. Descriptors <div style="display: flex; justify-content: space-between;"> <div> Computer programming Software Data Bases CONTU New Technological Uses </div> <div> Photocopying Copyright Information retrieval and storage Compilations </div> </div>			
17b. Identifiers/Open-Ended Terms			
17c. COSATI Field/Group			
18. Availability Statement Release Unlimited		19. Security Class (This Report) UNCLASSIFIED	21. 1 es
		20. Security Class (This Page) UNCLASSIFIED	22. Price PC A06-A01

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NATIONAL COMMISSION

on

NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS

- - - -

FOURTEENTH MEETING

Room 910
Crystal Mall Building No. 2
Arlington, Virginia

May 5, 1977

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1 JUDGE FULD: I call this meeting to order and
2 welcome you ladies and gentlemen to the fourteenth session
3 of the National Commission on New Technological Uses of
4 Copyrighted Works.

5 Our agenda starts with a discussion of the
6 Computer Issue.

7 THE COMPUTER ISSUE

8 JUDGE FULD: We will hear first from Commissioner
9 Hersey on that issue.

10 COMMISSIONER HERSEY: I had not intended to make any
11 presentation. I would like to correct for the record
12 two matters of fact in the Memorandum that I sent to the
13 Commissioners.

14 In the footnote on page 15, next to the last line,
15 E.P. Dutton should be deleted and Morrow substituted.

16
17 On page 28 in Section 4, I have been studying
18 an earlier version of the WIPO proposal and would
19 like to delete, right in the middle of the page, line 3 of
20 Section 4, the phrase, " * * * of the algorithm".

21 I am sure my colleagues would find other matters
22 to correct.

23 JUDGE FULD: Neither of these affect the substance
24 of what you wrote here?

25 COMMISSIONER HERSEY: No.

phonetic

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1 JUDGE FULD: You don't want to add anything, or
2 say anything?

3 COMMISSIONER HERSEY: I think the document should
4 speak for itself. I will have some comments to make later
5 on.

6 JUDGE FULD: This brings us to the Preliminary
7 Report made by the Software Committee.

8 I call on Commissioner Perle to address himself
9 to the subject.

10 COMMISSIONER PERLE: I similarly feel that
11 the report speaks for itself.

12 We have been through this before. We have
13 expressed our views, and this report pretty well expresses
14 what I think this Commission should come forth with as
15 recommendations to the Congress.

16 JUDGE FULD: Is there any discussion?

17 I would like to say that I am
18 a Member of the Software Committee, and I have been
19 given pause -- although I don't agree with all that John has
20 written -- I have been given pause as to whether there
21 should not be a particular specification -- a separate
22 article, if you will -- dealing with the Computer Software
23 problem.

24 I would like to withhold my ultimate decision until
25 I hear -- I hope there will be -- further discussion of the

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1 problem.

2 I would like to be better informed than I am
3 as to the working of the computer, and the connection between
4 the source and the object code, because I think that that
5 has an important bearing on whether it falls within the
6 Constitutional requirement of "the writing of an author."

7 It seems to me -- as I think on the problem --
8 that Congress probably has assumed that computer programs
9 with data bases are encompassed by the Constitutional
10 provisions. I suppose they have, but whether or not they
11 have given ^{it} the kind of thinking and analysis that the papers
12 we have before us evidence, I wondered whether we could not,
13 for the benefit of myself -- and I have no doubt, some
14 others -- get a further definition and description of the
15 workings of the computer.

16 It seems to me that the word "writing" in
17 the Constitution has undoubtedly been enlarged and
18 probably stands for part of -- instead of solely --

19 hand or mind. It would be most helpful to me if
20 someone -- perhaps Mr. Keplinger -- might explain for my benefit

21 and some others' -- how the two codes work:
22 how the source code becomes the object code.

23 MR. KEPLINGER: Yes, Judge Fuld. I will be happy
24 to make a brief summary.

25 As we heard from many of the witnesses who have

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1 appeared before the Commission, computer programs do
2 exist in different media and in different forms and, indeed,
3 there are differentiations that may be made within the class
4 of works which may be called "computer programs".

5 Computer programs exist in different types.

6 There are programs which exist to organize
7 and cause to function the hardware devices that are associated
8 with the computer system. These you may generally term as
9 "Executive Programs", or other "Master Programs" that control
10 the operation and organization of the entire computer
11 system, sometimes called the "operating system".

12 At a level below that, exist programs which
13 may be termed "Utility Programs."

14 These are programs that have, generally, utility
15 within a computer system. They exist to do the kind of
16 translation that Judge Fuld has alluded to between "source
17 code" and "object code". They exist for the execution of
18 general purpose functions such as sorting files of data,
19 or carrying out other commonly required functions within
20 a computer system.

21 The next level of computer programs that one
22 generally thinks of are those which are written by the user --
23 the ultimate end user -- of the computer system. These
24 are called "Applications Programs." They would be things
25 like payroll programs. They would be things like

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1 scientific computational programs to carry out such functions
2 as matrix inversion or the computation of fast fourier
3 transforms, or other esoteric mathematical functions.

4 But in order to understand how computer
5 systems function and how a source code -- at least in one
6 instance -- is translated into an object code, I think
7 it is wise to perhaps review some of the early discussions
8 that the Commission had on the functioning of computer
9 systems.

10 If I may make a very brief diagram on the black-
11 board, please excuse the extreme generality
12 of this identification:

13 A computer system may be thought of as consisting
14 of several basic parts.

15 There is that thing which we all see when we
16 see a movie, or something that presents a picture of a
17 computer.

18 You often see an operator sitting at a thing
19 that looks like a typewriter backed up by a cabinet that has
20 a multiplicity of flashing lights on it. That is generally
21 the operator's console, which is connected with something
22 called a CPU, or Central Processing Unit.

23 Intimately associated with the Central Processing
24 Unit -- the piece of hardware that contains the
25 instructional set that causes the computer to be able to do

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1 things -- is a main memory unit.

2 In some computer systems, these are combined
3 into a single unit; in other systems, they are separated
4 to a greater or a lesser degree.

5 Now, associated with this Central Computational
6 Unit are various levels of storage devices. There is a
7 temporary, or semi-permanent, storage system that is part of
8 the computer system, which puts data into and receives data from this
9 Main Memory Unit.

10 Now, at another level, there are less permanent memor
11 devices associated with computer systems, and these are what
12 we usually think of as tapes, or removable disk packs, or
13 other devices that are used to temporarily store data.
14 We simply call that "temporary storage", and data is shifted
15 among these storage locations under the control of the
16 Executive Program or Operating System that controls
17 the organization of the computer.

18 If I have a computer program that I have written
19 -- and let me use, as an example, something that I have done
20 myself, earlier -- I wrote a program to produce a listing
21 of patents having to do with computer software. The program
22 was written in a language called COBOL which is commonly
23 used for business data processing applications.

24 When I wrote this program and took it to -- and,
25 again, I am describing a particular kind of

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1 computer system organization --

2 JUDGE FULD: May I just interrupt?

3 MR. KEPLINGER: Yes, sir.

4 JUDGE FULD: I am a little puzzled here.

5 You are writing something, and I am concerned
6 about the differentiation between writing, and the process
7 that Professor Hersey had mentioned.

8 That is what you are going to get to?

9 MR. KEPLINGER: Yes, sir. I will try to get to
10 that.

11 When I have, say, created this thing which we will
12 call a Computer Program, and I want it to be used in the
13 process of creating some end piece of work, that program
14 has to be translated into what we have been referring to
15 as "object code" -- that which can be understood by
16 the Central Processing device. That is done through the
17 use of programs that are called variously, compilers,
18 assemblers, or translators, that translate the sort of
19 English-like language in which the program is written, into
20 the kind of instructions that this Central Processing Unit
21 operates on.

22 Just for example purposes, assume that I had
23 written a computer program, and it exists on a deck of punch
24 cards. As part of the deck of punch cards is a series
25 of preliminary cards that give instructions to this thing

1 that I call the Operating System, or the Executive System.

2 They do things like telling the computer system
3 what temporary storage devices the program will require;
4 how long the program should take to run; how many pages
5 of output should the program be limited to, in case there
6 is a failure.

7 That program is loaded in a temporary storage
8 device in the computer system and the computer will accept
9 and read those instruction cards that I gave it, to determine
10 how to process the program.

11 Assuming this were a COBOL Program, one of the
12 earlier cards would say to the Operating System: "Get
13 the COBOL compiler from this semi-permanent storage
14 location, and bring it into the main memory, so the CPU
15 can act on it."

16 It would then say, "Go to the temporary storage
17 location and get the source code written in COBOL that I have
18 produced."

19 The Compiler Program, operating on the source code
20 instructions, would create and store temporarily in the
21 computer system, the object code, putting it back into one
22 of these temporary storage devices.

23 The Executive Program would then see an
24 instructional card that says, "Execute this program".

25 When it sees this instructional card, it will

1 fetch from wherever it is stored, the object code, and bring
2 it into this Central Processing Unit, and execute the
3 instructions.

4 That is a very, very brief and generalized way of
5 describing what the computer does.

6 A compiler is a computer program that was written,
7 that ^{was} /created. As in any other computer program, it may be
8 written in a computer language that is very close to the
9 operating code itself, or it may be written in another
10 specialized, higher level language, especially tailored to
11 writing such sorts of programs.

12 And please -- I don't mean to be perjorative
13 by the use of "writing". It is simply jargon that I
14 am familiar with. I will try to avoid it.

15 JUDGE FULD: That is the Constitutional language.

16 MR. KEPLINGER: Yes, sir. I mean, in saying that
17 I "write" a computer program, I think that is part of what we
18 are discussing -- whether or not this thing is a "writing".

19 The compiler program, or the assembler program,
20 or the translator program, is something that, in Copyright
21 terms, may be regarded as accepting the instructional set
22 that I have written and preparing from it, a derivative
23 work -- perhaps -- that is then used further within the
24 computer system to cause certain operations to be carried
25 out.

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1 In some computer systems--this is true to a greater
2 or lesser extent -- the source code and the object code
3 may not be differentiated. Some manufacturers' computers
4 are tailored to process very well, a particular programming
5 language and, in fact, may execute merely -- in its original
6 version -- the source code that was prepared by the program.

7 JUDGE FULD: Dispense with the object code?

8 MR. KEPLINGER: In effect, the source code and the
9 object code may merge. But, in many instances, the source
10 code goes through a -- to use the jargon of the industry --
11 translation process that transforms it from a human-
12 readable form into another form that is still human-readable --
13 although with great difficulty -- that is used in the Central
14 Processing Unit to cause a computer to carry out its
15 functions.

16 I hope I haven't created more confusion than had
17 existed before I started on this brief attempt at an
18 explanation.

19 JUDGE FULD: Would you say a story or an article
20 in French -- could it be computerized into English?

21 Is that the analogy you are seeking to draw?

22 MR. KEPLINGER: People have suggested that the process
23 of translating a computer language from one version to another
24 --is analagous to the human translation effort involved
25 in going from, say, French to English.

1 I think that is an open question for this
2 Commission as to whether or not this view is accepted.

3 COMMISSIONER HERSEY: Mr. Chairman, may I comment
4 on this a little bit?

5 Mike has given us a very clear description of
6 these processes which I think even I understood, but his
7 difficulty is that, in describing what happens within the
8 computer, he has to use human language. He quite accurately
9 describes that what happens is that I tell -- or the
10 program, the card tells -- the machine to go to the storage
11 unit and move certain elements into the Main Memory, and
12 this sounds exactly like the instructions that he is
13 describing. But is it not the fact that, in a machine,
14 something different is happening?

15 The gaps in the card, or the magnetized informa-
16 tion on disks, in the form of electrical impulses, do go
17 through certain processes which produce the result.

18 In other words, I think the basic trouble in the
19 committee's framing of this issue is one of
20 euphemism. It is the issue that I tried to raise in the
21 paper.

22 As I understand the formulation now, the
23 committee suggests that the definition of a program
24 conform to the definition of a Source program, and that
25 the Object program be regarded as a derivative work

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I think we are in real trouble on that euphemistic level here, because --

COMMISSIONER PERLE: What do you mean by "euphemism"?

COMMISSIONER HERSEY: I mean it is calling something a derivative work which is not a derivative work.

Let me read to you, from Section 101, the description of a derivative work.

"A derivative work is a work based upon one or more pre-existing works, such as translation, musical arrangement, dramatization, picturization, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other form in which the work may be re-cast, transformed, or adapted.

A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a derivative work.

Well, we all know what those things describe.

COMMISSIONER PERLE: I think that is not what the problem is at all.

COMMISSIONER HERSEY: Let me just finish, if I may, because I don't think this is a translation.

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1 That is the word used in the trade but Mike,
2 in his final description of it, used a word which I think
3 ^{more} is/accurate. That is, "transformation".

4 When the Source code goes to the Object code,
5 it is transformed from ^a/language which is perceivable and
6 understandable by the human eye, to a mechanical process.

7 It is, in my view, not a translation. You see,
8 the derivative work is said to be an original work of
9 authorship.

10 Who is the author of the derivative work, in the
11 case of the object program?

12 The author of the derivative work, in the case of
13 the object program -- as Mike says -- is the compiler program,
14 or the assembler program.

15 I think we get into a real difficulty on the
16 cultural level -- of which I was speaking in the paper --
17 at this point, because it is one thing to make a correspondence
18 under law between communicating with human beings and
19 communicating with machines. It is another thing to make
20 a correspondence between authorship by human beings, and
21 authorship by machines.

22 The compiler program is an object program. It is
23 a process and the author of the derivative work -- so-called,
24 in this case -- is a process, not a human being.

25 I think this is a fundamental difficulty with the

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1 formulation that the committee has given us.

2 JUDGE FULD: Yes.

3 COMMISSIONER NIMMER: Mr. Chairman, I think the Hersey
4 paper is very well done. I found it very helpful to my
5 thinking and I am in partial agreement with it, but only
6 in partial agreement with it.

7 My thinking is still fluid, I must say, on this;
8 but I would like to share with you my reaction.

9 When John makes the point that makes the
10 distinction between telling -- communicating -- something,
11 and doing something, and he says, "The computer program
12 does something" -- at least the final version of it --
13 "does something to the machine", it is a part of a machine,
14 rather than in any human sense, communicating. It is doing.

15 He raises an interesting distinction which requires
16 some thought but, in a sense, it takes us back to the old
17 White - Smith versus Apollo. You know, in that case, the
18 Supreme Court said, in 1908, that a player piano roll
19 was not a copy of the music but was, rather, a part of the
20 machine. It was a part of the instrument -- the piano --
21 and, hence, from that, the Copyright doctrine was built up
22 that, unless you could visually understand it with the naked
23 eye without the aide of a machine, it was not regarded as
24 a copyrightable work.

25 Well, we passed that under the new Act -- the

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1 definition -- this does not get in the policy question but,
2 just for a moment, it gets into the technical question --
3 under the existing law or, rather, the new law that will be
4 effective next January, it doesn't make any difference
5 whether you can read it by the naked eye, or read it with
6 the assistance of a machine. The tangible object -- if it
7 is communicable and intelligible, even with the assistance
8 of a machine -- can be regarded as a copy.

9 Well, that is kind of a technical aside.

10 Let's get to the fundamental policy point which
11 really should concern us.

12 Should it make a difference that the embodiment
13 tells a machine to do something, rather than communicates
14 a message to us?

15 Should that make a difference in terms of
16 Copyrightability?

17 And one has to deal with -- as the Hersey paper
18 does in part but not entirely satisfactorily, it seems to me
19 -- one has to deal with the analogy of the phonograph record and
20 the video tape.

21 The phonograph record, in a sense, tells the machine
22 what to do. The grooves in the record create a response
23 in the machine which then, ultimately, gives us music.

24 Video tape is not at all intelligible to the
25 naked eye, but it tells the machine what to do. Or, you could

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1 say, more realistically, it does something to the machine.
2 It doesn't tell the machine. That is the euphemism. It
3 does something to the machine, but the machine, then,
4 produces something that we can recognize.

5 And on this derivative work thing, I agree with
6 John. It is not a derivative work; but his argument is
7 that it is a copy.

8 That is, suppose you have a conventional motion
9 picture film with a series of still pictures on the motion
10 picture film, and you convert that into video tape -- which,
11 of course, can be done.

12 The video tape is not perceptible to the naked eye
13 and it would be wrong to call the video tape a derivative work
14 of the motion picture film. It is not. Nothing copyrightable
15 has been added in the video tape that was not already in the
16 motion picture film.

17 But I don't think it would be improper to call the
18 video tape a copy of the motion picture film in a different
19 form; but it is a copy. So that, whatever there was that was
20 copyrightable in the motion picture film is also copyright-
21 able in the video tape.

22 The fact that the video tape cannot be read by
23 the naked eye, but only can be read if it activates a machine,
24 does not change the video tape from being a copy, it seems to
25 me.

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1 to
2 So that /that extent, I have some disagreement
3 with Commissioner Hersey.

4 But now let me say to what -- on,perhaps, a broader
5 basis -- I have agreement -- an emotional and, I think, an
6 intellectual agreement with the position. That is, when
7 John suggests that computer programs should not be regarded
8 as the work of authors, when the result of a computer program
9 does not result in anything that is recognizably the work
10 of an author, I have some sympathy.

11 What I am getting is that a computer program that,
12 say, tells trains when to go and when to stop, or that
13 otherwise activates machines, the machines do whatever they
14 do, but what they do has nothing to do with ultimately
15 producing what anybody would regard as a work of authorship
16 unless you are going to regard the computer program, itself,
17 as a work of authorship. That kind of a computer program
18 does not seem to me, tentatively, to be the kind of
19 computer program that should be in the Copyright domain.

20 But there are other computer programs that do
21 select from a data base, from underlying material -- pre-
22 existing material -- that clearly is the work of authors
23 and the computer program then makes a selection and arrange-
24 ment out of that pre-existing material and, ultimately,
25 produces something that clearly is a derivative work.

 That is, suppose you have a derivative work or,

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1 in the terminology of the new Act, either a compilation or
2 a derivative work. Suppose you have pre-existing material
3 that clearly is a work of authorship. The Collected Plays
4 of Shakespeare. And then you have a computer program
5 that directs you to all of the scenes in which lawyers
6 are involved in Shakespeare's plays.

7 Now, the resulting work would be a collection of
8 Shakespeare lawyer scenes and, under existing Copyright law,
9 I think that pretty clearly -- the final product -- would
10 be a copyrightable work. It may be of minimal value,
11 as far as the contributions concerned, but it would be
12 regarded as copyrightable -- that collection and arrangement.

13 Well, then, should the program which determines --
14 which does the selection and arrangement by machine -- should
15 that be regarded as, itself, copyrightable?

16 Well, I think so. I think it shouldn't make any
17 difference. It seems to me it should not make any difference
18 whether it is in a form that is humanly readable, or simply
19 activates the machine, if it does result in that kind of
20 a product.

21 So what I am getting at -- very tentatively --
22 is: Should we, perhaps, say that a computer program is
23 copyrightable if its activation -- if it produces a product
24 which would be regarded -- if the product would be regarded
25 as a compilation, or a derivative work, then the computer program

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1 which creates such a compilation or derivative work is, itself,
2 copyrightable.

3 If, on the other hand, the computer program merely
4 results in trains running on time -- or whatever it does --
5 but not in a product which is a compilation or a derivative
6 work, then it should not be protected.

7 COMMISSIONER HERSEY: You seem to have troubles
8 with that.

9 COMMISSIONER PERLE: I hardly know where to
10 start!

11 JUDGE FULD: Start at the beginning!

12
13 COMMISSIONER PERLE: I would like to start at the
14 beginning. I would like to start where this Commission
15 started; and how it came about; and why Copyright Law
16 Revision started.

17 Copyright Law Revision started because the
18 strictures and the language and the interpretation of
19 the 1909 Act was such that it simply did not fit into
20 our Society. It did not accomplish its end. And everybody
21 recognized that.

22 Then we went through the long process of Copyright
23 Law Revision, and the Congress got half way down the road
24 with computers and said, "The technology is beyond
25 us!"

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1 In the brief period of time between the period
2 of the first House hearings, and the last hearings, there
3 was 117, because the technology had advanced so rapidly
4 that the Congress did not know how to handle it.

5 So they said, "Before the enactment of 117, let's
6 get a group of intelligent human beings" -- and I mean
7 human beings -- "and see if they can develop" -- you should
8 pardon the expression -- "a program that we can act on.
9 We, the Congress."

10 And what that program, as I understand it, is
11 supposed to be, is to figure out how the body of law can
12 accommodate and foster the growth and the prosperity and the
13 well being of the people who live in this Country.

14
15
16
17 What we are doing now is so terribly counter-
18 productive to the development of a philosophy that in the
19 long range, will work, that I just don't believe that this
20 really incredibly good Commission is taking a look at what
21 it is doing.

22 What are we doing?

23 We are getting bogged down in terms that we don't
24 know; that we don't appreciate; and, certainly, that we are
25 using improperly.

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When I hear Mel Nimmer -- for whom I have
incredibly high regard and respect -- say to me that a
program should be protected only if its product, its
application, the use to which it is put, is protectable,
I say, "I don't understand what I have been doing here,"
because I have been talking about protection of the program.
I have not talked about -- none of us have talked about --
the way it operates within a machine.

The intellectual property that is protectable is
this program. It is not the product of the program.

When Shakespeare sat down to write a play, when
Artnur Miller -- the other Arthur Miller -- sat down to write
a play he

ended up with a protectable thing. There is no question about the fact that it was copyrightable.

What was protectable were the words, not the way the play was performed; not the way one actor, rather than another actor, performed the play.

So I don't know what we are talking about!

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1 When we talk about, "How is something utilized",
2 that does not change the basic nature of it. It is the
3 program, itself, and if we start getting bogged down in
4 Source codes and Object codes, and the fact that it is the
5 word "code" rather than "program" that we are talking about,
6 we really start getting involved.

7 I don't care whether something is a Source code
8 or an Object code, or some other type of code that has not
9 been invented yet, but will be.

10 What I think has to be protected is how somebody
11 sat down and figured out how to put down--to fix in one form or
12 another -- his concept of an idea so that/idea could have
13 some utility or application or purpose in some way. It is
14 intellectual property; it is fixed; the guy has worked
15 very hard; how do we protect it?

16 And the fact that one code, one program, may be
17 used to convert all material that is put within the machine,
18 is merely the application of it. I am not worried about
19 that.

20 Similarly, I don't care if we call something a
21 derivative work, or not. That is really getting bogged down
22 in semantics and euphemisms.

23 What we are basically talking about here is: How do we
24 best protect -- or should we protect -- that effort, that
25 creativity that went into that writing that ultimately allowed

1 something to function. And I don't think that we should get
2 bogged down in red herrings.

3 I mean, you mentioned White-Smith versus Apollo.

4 In all due respect to Mr. Hersey, I think that
5 his paper bears a tremendous relationship to White-Smith
6 against Apollo.

7 He is saying, in effect: "A program does not
8 look like, or feel like, or sound like something that I
9 wrote."

10 That is what happened in White-Smith versus
11 Apollo; and that is no longer good law.

12 It doesn't matter what it looks like, or feels
13 like, or sounds like, because we are dealing, on this Commis-
14 sion -- I hope -- with new technology; not traditional works;
15 not traditional concepts. We are looking for a philosophy
16 of protecting that which is the writing of an author. And
17 we want something that is not going to be so outmoded, and so
18 out of date, and so archaic, that it is going to be the
19 Long Island Expressway before it is built.

20 We want something that is going to last more than
21 ten years.

22 JUDGE FULD: You see no differentiation between
23 "writing" and "processing"?

24 COMMISSIONER PERLE: I think there is a tremendous
25 difference between "writing" and "processing".

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1 The process may very well be the use to which a
2 writing is put, but there is no question in my mind that
3 a program standing by itself is a writing. It may become
4 part of a process in its application, but even this is getting
5 bogged down, in all due respect.

6 I think that, whether you are talking about a
7 process or anything else, that is putting a label on things;
8 that is a euphemism.

9 What we are basically talking about here is: If
10 I come up with a flow chart, clearly copyrightable, that is one
11 way of fixing that which I have created.

12 If that same thing happens to be on a "chip",
13 it still embodies my intellectual product.

14 COMMISSIONER NIMMER: What about a plan for combustion
15 engines?

16 Should that be copyrightable?

17 COMMISSIONER PERLE: A plan for combustion
18 engines? Absolutely!

19 COMMISSIONER NIMMER: And should they give the right to
20 prohibit someone from making a combustion engine?

21 COMMISSIONER PERLE: No. I don't want to preclude
22 anybody from making that combustion engine. But you see,
23 even here, that is a bad analogy, because now we are talking
24 about patents.

25 COMMISSIONER NIMMER: Gabe, you said a moment ago, that

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1 all it had to be was intellectual property and "fixed".

2 Well, that is "patent" as well as "copyright". So, weren't
3 you ignoring that?

4 COMMISSIONER PERLE: No. Because, in the very
5 first instance, in building my combustion engine, I can
6 build a combustion engine in any number of ways. I can sit
7 down and build one.

8 I say, "Okay. I want to have something that is
9 going to explode on the inside and not on the outside, and
10 drive something." And, just by the process of trial-and-error,
11 or my own learning, I get a piston and I get a valve, and
12 all the rest of it.

13 COMMISSIONER NIMMER: Well, how does that differ from
14 the computer?

15 COMMISSIONER PERLE: Because you don't write a
16 program by just sitting down and putting together a bunch
17 of pieces.

18 What you do is create a plan for the engine.

19 But, again, I don't want to work with analogies, now.
20 They don't work.

21 COMMISSIONER NIMMER: Well, you run into a problem when
22 you get into the patent sphere, precisely.

23 Aren't you, in a sense, invading the patent sphere
24 in computer programs that do purely mechanical types of
25 functions?

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COMMISSIONER NIMMER: I am not talking about that.

In that sense, you could say a copyright can give complete protection to television sets, combustion engines, everything else --

COMMISSIONER PERLE I am not saying
that; and you know it!

COMMISSIONER NIMMER: What I am saying is that the distinction between copying and independent creation -- the copyright distinction -- that is, a collateral distinction between the two; but the fact that you maintain the copying requirements does not mean that there is no "substance" question as to what the area of copyright may cover.

Could we not both agree that the copyright should not cover inventions, regardless of whether the infringing act is a copy, or an independent creation?

Right?

COMMISSIONER PERLE. If there were not fuzziness, we would not be sitting here.

If there weren't fuzziness, the Copyright Office
would not accept computer programs for registration

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1 and the Benson and Dann decision would not have
2 said that probably they are not patentable.

3 COMMISSIONER WEDGEWORTH: I think that we may be losing
4 sight of the fact that the committee Report does attempt
5 to address most, if not all, of the issues that are raised
6 by John Hersey. I read both of them very carefully
7 and re-studied them, and I think I will have to agree
8 substantially with Gabe that the points that are really
9 emphasized don't really give me that much of a problem.
10 That a computer program is a writing and a process; that is
11 true, but it is also true of a sound recording and a motion
12 picture.

13 What may be different is that the two aspects are
14 somewhat indistinct in the case of a computer program; but
15 I don't think that is terribly significant.

16 John points out that a computer tells how, as
17 well as does. That is true, but a computer program does
18 things no more than the human brain cooks, cleans, and sews.
19 There, again, I think it is a point that we would belabor;
20 but I don't see much significance in that, either.

21 The real things that were brought forth in
22 Commissioner Hersey's paper that I think bear some close
23 consideration deal with the area of the cultural implica-
24 tions, and the matters that we raised with regard to deposit.

25 I think there are a couple of questions that are

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1 appropriate for us to consider, in addition to that which
2 is brought out in what I consider to be a very fine
3 committee Report, and that is: In looking at computer
4 programs, the question is: What is the social value of
5 Copyright with respect to computer programs; and can some
6 other type of protection serve as well, or better?

7 I think that that question is addressed in the
8 committee Report, but I think that some of the things
9 that Commissioner Hersey raised do give me pause, and I
10 think we may want to give a bit more emphasis to that than I
11 think the committee gives to it.

12 The other question that occurs to me is a closer
13 look at the motivation or the needs of consumers and creators
14 of computer programs that may exist, to compel the development
15 of Copyright Law in this direction.

16 I think those are two very pertinent questions that
17 get around all of this business about the source program,
18 and the object program that, I agree, does not lead you
19 anywhere.

20 What we are really talking about is: What is the
21 ultimate social value of putting it here, as distinct from
22 putting it there when we all can agree that this is
23 creativity.

24 John, I might say that what we are doing in a
25 certain sense, in bringing computer programs into it, is

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1 really extending the range and power of human creativity
2 in ways that were totally unforeseen before.

3 But I think that the points that I raise are the ones
4 that appear to be very important to me.

5 Now, with regard to the "deposit" requirements,
6 I am a bit troubled by that -- more troubled than I have
7 ever been before I read the Hersey paper -- because one of
8 the first questions that arose was: What is fair use of
9 the computer program?

10 Is there any opportunity for there to be any
11 research and study on the development of computer software,
12 if there are no provisions for deposit and public accessibility
13 to those kinds of things?

14 Why should a computer program be treated any
15 differently from other works of creativity that are copyrightable
16 with respect to research and study and access?

17 I think that that is a very legitimate question
18 that John raises, and that I would like to see pursued.

19 COMMISSIONER PERLE: May I?

20 Barbara, could you for the benefit of the
21 Commission, tell us how the deposit requirement evolved,
22 and what it was supposed to do? What its function was?

23 COMMISSIONER RINGER: Very briefly, there was, obviously, a
24 legal question as to the copyrightability of computer programs.

25 COMMISSIONER PERLE: No.

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1 COMMISSIONER RINGER: I am sorry.

2 COMMISSIONER PERLE: Historically, where did --

3 COMMISSIONER RINGER: Oh, deposit --

4 COMMISSIONER PERLE: Deposit within the Copyright Office
5 within the Library of Congress.

6 COMMISSIONER RINGER: Initially -- this goes all the way
7 back to the original Copyright Statute -- the earliest Statute
8 in the early part of the 19th Century divided "Deposit" and
9 "Registration", and the "Deposit" copies floated around
10 the Government and largely got --

11 COMMISSIONER PERLE: What was the Legislative
12 history of the deposit form?

13 COMMISSIONER RINGER: It was tied in with Registration.
14 It was not intended, originally, to enrich any collections
15 of any sort. It was intended as a record of the material
16 deposited.

17 I am not sure this is the answer you want, but
18 I think this is accurate.

19 The Library of Congress took over the Copyright
20 system in 1870 with the basic idea of creating a deposit
21 collection which was to serve a dual purpose: as a record
22 of the Copyright Registration and as a source of material
23 for the Library.

24 Is that what you want to know?

25 COMMISSIONER PERLE: Well, I was just trying to

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1 elicit in a Socratic way -- which I did not succeed at --

2 that historically, the deposit requirement really
3 had nothing to do with being a source -- a scholarly source
4 or anything else.

5 COMMISSIONER RINGER: This is true.

6 COMMISSIONER PERLE: We should not lose sight of
7 that.

8 COMMISSIONER CARY: Gabe, you might be interested
9 in knowing that in the 1790 Act, the deposit was
10 not with any Government agency per se, but was within the
11 Office of the Clerk of the District Court.

12 COMMISSIONER PERLE: It really was a basis for
13 suing.

14 COMMISSIONER CARY: It is a record, isn't it, of the
15 means of expression.

16 Right?

17 COMMISSIONER PERLE: A record -- not an exclusive
18 one.

19 COMMISSIONER WEDGEWORTH: But it does reinforce this matter
20 of the preservation of cultural artifacts. That was the
21 point I was trying to make.

22 COMMISSIONER PERLE: Respectfully, no.

23 COMMISSIONER WEDGEWORTH: Well, I think it is very clear
24 that another kind of creative product has been used in this
25 way, and what we are doing is: We are making an exception

1 -- and if I might hazard a guess -- out of convenience.
2 for

3 COMMISSIONER LACY: Isn't it true that/only a
4 relatively small minority of all things copyrighted -- only
5 a small minority of all things copyrighted -- are copies
6 retained on deposit.

7 You include advertisements, now, mail order
8 circulars --

9 COMMISSIONER RINGER: It varies from class to class.

10 COMMISSIONER LACY: But, of all things copyrighted
11 --

12 COMMISSIONER RINGER: Less than 50%.

13 COMMISSIONER NIMMER: No other Copyright system in the world
14 has the kind of teeth requiring deposit as does our Act,
15 and it is generally not regarded as something essential or
16 encouraging to authorship -- quite the contrary.

17 JUDGE FULD: Arthur Miller.

18 COMMISSIONER MILLER: Bob Wedgeworth spoke so
19 rationally, and reached such obviously correct conclusions
20 as a prefix to the points bothering him, that I am sorely
21 tempted not to speak at all!

22 However, judging from the discussion before Bob
23 spoke, I will restrain my instinct not to speak and violate
24 two principles.

25 I have been on airplanes 29 out of the last 48

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1 hours, and I am still vibrating, which will make my speech
2 less than coherent. Anyone who has been near me this
3 morning also knows that I am in desperate need of a shave
4 and a shower.

5 I will violate my decision on arrival here
6 this morning not to speak.

7 I will also violate my year-long principle not
8 to be in the Academic business because I am on Sabbatical!

9 I am surprised at what Mel said, and it is a
10 little distressing. I think it is important, in looking
11 at what we are talking about, to realize that we are dealing
12 with at least three separate things, and they have to be
13 treated differently.

14 First, we are dealing with a description of a
15 process. You can call it a set of instructions, or a
16 description of a process.

17 Second, we are dealing with a process --
18 the actual functioning of the description; and

19 Third, we are dealing with the output of that
20 process -- the results of that process.

21 Let me give you a simple little example:

22 Let's make believe I am Seurat. I conceive of an
23 idea for an art form. Let's call it Pointillism.

24 I say to myself, "How will I execute Pointillism.

25 I will take brushes of a certain dimension, paints

1 of a certain quality, a canvas of certain dimension and
2 texture, and I will manipulate these ingredients with my
3 hand to produce a result, which we might euphemistically
4 call a painting.

5 Now, we have three different things there:

6 We have the idea and the description of the process
7 as conceived in Seurat's head.

8 We have him sitting there with that brush, execut-
9 ing that internalized description.

10 And we finally have a painting which is a product
11 of the actual application of the process.

12 There is no doubt that the painting is copy-
13 rightable -- the "output", which Mel referred to before.

14 There is also no doubt -- given Baker v. Selden
15 and 18,000 other cases we might cite -- that if Seurat
16 of translated the collection/mental impressions, the descriptors
17 in his brain, on how to produce Pointillism on pieces of
18 paper, if he described the process in alpha numeric form,
19 that is copyrightable.

20 And there is also no doubt -- taking Baker v.
21 Selden and 18,000 other cases -- that the actual process
22 itself is not copyrightable.

23 Now, what are we talking about with the computer
24 program?

25 In my judgement as a Member of that committee,

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1 I am talking about the first of the three elements. All
2 I am talking about is the description of the process. I am
3 not talking about the actual electro-magnetic functioning
4 of that program in conjunction with the machine, to do
5 something. Nor am I talking about the output, whatever it
6 may be, whether it is to run a train, or to balance a check
7 book, or to do anything else.

8 Let's take a real life illustration that the
9 Members of the Commission have heard me use nauseatingly
10 repetitively. You have a man in West Germany who wants
11 to create a new art form. It is not going
12 to be Pointillism. It may never see the light of day!

13 He conceives of the new art form as taking all
14 of the works of a single master, overlaying them, one on
15 top of another, and randomly selecting individual lines
16 from different works of that master to assemble a new set
17 of lines never drawn by the original master.

18 Now, if he sits down like Seurat , and writes out
19 the description of how to do that, that manual is copy-
20 rightable.

21 It is clear, also, that the physical way he
22 manipulates the pieces of paper and randomly selects the
23 lines, is not copyrightable. And it is probably true --
24 and I need not reach the decision; and that is why I am
25 going to use "probably" -- but it is probably true that

1 each of the resultant assemblages of lines from the old
2 master, is copyrightable--to meet Mel's point.

3 Now, let's suppose that he sits down and
4 decides that life is too short to do this by hand. So what
5 he does is program a computer which, on a graphic display
6 is a great format; takes each of the old masters. He is
7 doing it with Dürer, and he lays each of the Dürers on to the
8 machine and inputs them so that, in each grid position
9 in storage, there is an assemblage of lines, each of which
10 is drawn by Dürer, and then he sits and he presses the
11 output button, and the machine automatically pulls a line
12 from each of the grids; assembles it; and produces the
13 other work of art.

14 Now, if he is writing in good old English, of
15 a manual, on how to execute this art form, it's copy-
16 rightable even though the process of doing this was not
17 copyrightable.

18 It is difficult for me to believe that his writing
19 a computer manual -- which we will call a program -- is not
20 copyrightable, and that that copyright/extend ^{does not} to the series
21 of instructions he has conceived to tell this machine to
22 produce this result.

23 We are not copyrighting the process, and we may not
24 even copyright the output. That is not what we are talking
25 about.

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1 We are only talking about the series of instructions
2 he is giving the machine; his creativity; his conception of a
3 new art form, mechanically assisted.

4 It may not scan the way traditional English has
5 scanned.

6 It may not be in paragraphs, or have chapters.

7 But it is very difficult for me to understand
8 why that is not copyrightable in the traditional sense.
9 And the business of moving from object to source code is
10 garbage! It doesn't really matter whether one is a copy of
11 -- in video-tape-kinescope sense; or whether one is
12 a translation in the Russian/English sense; or a derivative
13 work. That is the kind of technical debate that is of
14 no moment. It is probably one of the three; but who really
15 cares? It is not a one-to-one correlation between Object
16 and Source, the way kinescope to video tape is.

17 But all this man is doing, in the language of the
18 computer, is writing a manual. He is writing a treatise on
19 Pointillism, or he is writing a treatise on computer-based
20 art.

21 It is true, John, that in many of its utilizations,
22 that manual will communicate with the machine.

23 It is also true that that manual can be perceived
24 by other human beings.

25 COMMISSIONER HERSEY: Only if it is listed.

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1 COMMISSIONER MILLER: To be sure.

2 All the new Act requires, as Mel correctly points
3 out, is that the work be perceivable or intelligible through
4 the intermediation of a machine and, if it is listed, it
5 becomes an alpha-numeric manual in Pidgin English.

6 COMMISSIONER NIMMER: Arthur, I agreed with your example,
7 but I think it was totally irrelevant to my point.

8 COMMISSIONER PERLE: You've got two Academicians
9 together!

10 COMMISSIONER NIMMER: I made the point that if the final
11 product is not regarded as a work of authorship, then the
12 earlier instructions also should not, obviously, be regarded
13 in the Copyright sphere.

14 You said to me -- you said to all of us --
15 "But there is a distinction between the final product and
16 the original instruction."

17 Of course, I agree with that but, then, to prove
18 the point that it should make no difference what the final
19 product is, in protecting the earlier instruction, you took
20 an example where the final product is a work of art.

21 COMMISSIONER MILLER: I will write you a manual
22 on how to build a television set.

23 COMMISSIONER NIMMER: Exactly!

24 Now, suppose you don't have a manual on how to
25 make a television set, but you have a wire circuit -- a wire

1 on a given television set, or a long list of chemical
2 formulas on how to produce a given drug.

3 Now, is it your position that that wire circuit,
4 because it was not copied from anyone else its particular
5 contours are original; therefore, no one may reproduce that
6 wire circuit without infringing copyright.

7 Is it your position that, in order to produce
8 a given drug -- because there is an original listing of the
9 formula -- that therefore, no one may reproduce that
10 formula in making the drug?

11 COMMISSIONER MILLER: If my name is Alexander
12 Calder, and I put together a series of wires, I have a
13 copyright.

14 COMMISSIONER NIMMER: You are still giving an example of
15 the end product being a work of art.

16 It seems to me that it is fairly clear under
17 established Copyright principles -- and correctly so --
18 it should be, in terms of social policy, that is -- that a
19 wire circuit -- if you can claim protection as a work of
20 art, and then you get into a whole area of: What is a work
21 of art; and that, I suggest, is still relevant under the
22 new Act, apart from its esthetic function -- and some
23 wire circuits maybe, argueably, have protection on that
24 basis -- but let's eliminate that. Let's go to the list
25 of chemical formulae.

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1 It seems to me it is pretty clear that wire
2 circuits and chemical formulae, although they are written
3 on paper and are words on paper, do not, under Copyright,
4 prohibit reproduction of the formulae, or reproduction
5 of the wire circuit; and certainly don't prevent such
6 reproduction for the purpose of creating the television
7 set of which this is the wire circuit; or creating the
8 drug which the formulae spell out.

9 So I suggest that it is relevant what the final
10 product is going to be.

11 I agree completely that it is a separate function;
12 a separate process. They are not the same thing.

13 And I agree that there can be copyright protection
14 for the plan for the instructions in many circumstances,
15 quite apart from the copyright for the final product.
16 They are separable. Agreed.

17 But I can't quite agree that it is irrelevant,
18 totally irrelevant, to what it is going to produce.

19 If it is going to produce something that clearly
20 is in the Patent sphere, or any other sphere, but it has
21 nothing to do with work of authorship -- as I think we would
22 agree, a wonder drug is not the subject of copyright; and
23 I think we would agree that a television set, per se, is not
24 the subject of copyright. Then at least I would like to
25 consider the question of whether the wire circuit for

1 the television set should be regarded as protected by
2 copyright.

3 A book -- a book that describes a television set --
4 sure, is protected, and for that I take it you are saying that if
5 the book is protected, what is wrong with protecting the
6 wire circuit which merely does what the book is describing;
7 which merely presents it in a more graphic way?

8 I think there is a difference.

9 COMMISSIONER MILLER: That is not my argument.
10 Don't push me into the wire circuit.

11 Compare the book with a set of instructions to
12 the machine, called the "Program". That is what we are
13 talking about.

14 We can fight about the relevance of the intermediate
15 format; the circuitry. I don't even want to fight about
16 that, because I think it is a red herring, frankly.

17 In my judgement, what the committee has said
18 is that the copyrightability of the end product of the
19 process described in the program, is an irrelevancy in terms
20 of the copyrightability of the description called the
21 "Program".

22 It may be relevant to the scope of protection
23 and power of the copyright accorded to that program, but
24 not necessarily to the copyrightability of the program.

25 And here, you know as well as I know, that what we are

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1 talking about is the problem raised in cases like Baker,
2 Beardsley, Continental Casualty and the Morrissey case
3 in the First Circuit. We are worried about that situation
4 in which according copyright protection to a description
5 of a process may block access to the ability of other people
6 to practice the process described in the program.

7 That is a different question from the question
8 of whether you initially grant copyright protection in the
9 program.

10 It is a question that Courts are uniquely and
11 historically competent to determine: whether the anti-
12 competitive, or monopolistic consequences of declaring
13 full bodied copyright protection in this particular program
14 may prevent us from running those trains, or prevent us
15 from building the television set; or prevent us from
16 manufacturing the drugs, in particular cases.

17 That is a second-level question.

18 We had testimony making it clear -- and it was
19 not contradicted on the record -- we had testimony several
20 times from people who said that the modern programming art
21 has reached the point where you can achieve the result you
22 want through many, many different sets of instructions,
23 and that you could grant copyright protection to the
24 description, the instructions, the programs, without
25 blocking access to the result to be achieved through the

1 machine.

2 If that is true, then we don't have a Morrisey
3 problem; we don't have a Beardsley problem; we don't have
4 a Baker problem, at least at the point of determining
5 copyrightability; that some situation may subsequently
6 arise in which a Court will say, "Uh, Uh. In this case,
7 the copyright would be too powerful in this program". That,
8 I can understand. But that is an ad hoc, particularistic
9 kind of inquiry that does not interfere with the basic
10 principles you are trying to establish.

11 JUDGE FULD: Any other views?

12 COMMISSIONER WEDGEWORTH: I would like to ask Arthur
13 a question. It is to that latter point that I gave some
14 thought -- as to how the deposit, or exemption of the
15 deposit requirement, might affect the power of the copyright.
16 That is what concerned me; and it was not that I disagreed
17 with the committee's conclusion. There was no real
18 discussion of that. I just thought it needed exploring
19 further.

20 COMMISSIONER MILLER: I am very troubled.

21 I may break ranks with my colleagues on the
22 committee on this -- the deposit issue.

23 With all due respect to the history presented
24 to us -- whatever the historical routes of the deposit
25 requirement may have been -- it does not strike me as ir-

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1 rational to say, in 1977, that it would be appropriate to
2 consider utilization of the deposit requirement not only
3 as an enriching technique, but as a ventilation technique,
4 for reasons we have just discussed, Mel, and in an area
5 in which, despite the testimony, I have some pangs of
6 uncertainty.

7 COMMISSIONER WEDGEWORTH: That requirement could
8 specify particular types of deposits.

9 The thing that troubles me about the description
10 is that there are too many opportunities to obscure what
11 is really being copyrighted.

12 COMMISSIONER MILLER: That is right. That is right.

13 I am confident, Bob, that a set of deposit
14 requirements could be worked out to guarantee ventilation,
15 and to avoid the problem you are addressing -- which I
16 think may be a real one of slipping someone a copyright
17 and then discovering that that individual is playing
18 "Trade Secret" with us, which would be the worst of all
19 possible worlds.

20 COMMISSIONER CARY: Like Mr. Wedgeworth, I had
21 the same difficulty on the deposit problem.

22 I do note, however, that the committee did
23 propose that if that were not acceptable, there could be
24 an alternative: namely, accepting, as I understand it,
25 the complete deposit of one program as it originally appears,

1 without requiring each program to be submitted whenever there
2 is an alteration, or a modification, at a later date.

3 Personally, I think that would satisfy the doubt
4 that Bob raises; which I have. I would like to see that
5 alternative recommended myself, rather than the original.

6 JUDGE FULD: Do you want to speak further, John?

7 COMMISSIONER HERSEY: Yes. Gabe characterized
8 as "semantics", and Arthur as "garbage", some of the
9 distinctions that we have been talking about between Source
10 and Object. But I can read English, and your report does
11 make these distinctions and, I think, also blurs them.

12 Arthur, you said you are not talking about the
13 product, but if you talk about -- as you do -- a derivative
14 work, you are talking about a product.

15 When the compiler program goes to work on the
16 source program, and converts it into the object program, you
17 have a derivative work, which is a product. That derivative
18 work, in turn, becomes an author -- as in the compiler
19 program -- where it is the author of the new derivative
20 work.

21 Of course there are distinctions, and blurrings of
22 distinctions within the program, as you set it up.

23 COMMISSIONER MILLER: Fortunately, we have
24 written the word "Draft" on the first page of the
25 committee's Report, and we can address ourselves to those

1 blurrings.

2 If a human being sat down with a Source program,
3 and re-wrote it into an Object program, that would be a
4 process not terribly dissimilar from translating English
5 into Russian, although I don't like to play/ ^{with} these kinds
6 of analogies.

7 I say it only because I don't think it makes much
8 difference whether a human being goes through that process
9 laboriously, and wastefully, rather than having a compiler
10 program that is mechanically equipped to make that transla-
11 tion, transmutation, transformation, transsubstantiation --
12 whatever you want to call it.

13 The net result is a different set of alpha-
14 numerics that will perform the same function as the first.

15 JUDGE FULD: Mel?

16 COMMISSIONER NIMMER: Arthur, getting back to the Baker versus
17 Selden point, and you say, quite correctly, that we have had
18 a great deal of testimony saying that computer programs may
19 be expressed in a number of different ways.

20 I think that is right. To the extent that that is
21 right, then Baker versus Selden does not apply. That is,
22 the limitation of Baker versus Selden. And hence, what
23 is said in the report about it being "thin protection"
24 may not be true, I think.

25 It is thin, only if Baker versus Selden applies.

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1 But beyond that, I am still troubled. Do we want
2 to say that, because a television set -- the end product
3 of the television set -- can be achieved by wire circuits
4 in a number of alternative ways -- assume that to be the
5 case -- I assume that to be the case because, if that is
6 the case, do we then want to say, therefore, Baker versus
7 Selden does not apply, and one who reproduces the wire
8 circuit in the way that the first person did is a copyright
9 infringer?

10 COMMISSIONER MILLER: If the wire circuit represents
11 only one of a limited number of ways --

12 COMMISSIONER NIMMER: No. No! I am assuming it can be
13 done in a great number of ways -- however number of ways
14 are necessary in order to pass Morrissey, as well as Baker.

15 Who knows what that is?

16 COMMISSIONER MILLER: Well, you know, I could see
17 a situation in which, in the Beardsley/
18 Morrissey coupling, you could say, "We are going to give
19 you a copyright on that wire circuit". By the way, "wire
20 circuit", to me, can be read. It is intelligible, not to
21 your eye, nor my eye. That was the great mistake made in
22 White - Smith versus Apollo.

23 COMMISSIONER NIMMER: Sure. Sure.

24 Those pianola rolls could be read. Probably more
25 people could read the pianola rolls than could read Russian.

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1 COMMISSIONER NIMMER: But this results in music.

2 COMMISSIONER MILLER: It also results in a two-or-
3 three-dimensional projection of images. Right!

4 You have that wire circuit. There may be a risk
5 of blockage of the manufacture of television sets if you
6 grant too powerful a monopoly over that wire circuit.

7 COMMISSIONER NIMMER: I want to put that point to one
8 side.

9 Assume there isn't going to be such blockage.
10 If there is, I agree that Baker v. Selden comes into
11 play.

12 COMMISSIONER MILLER: Okay.

13 COMMISSIONER NIMMER: Assume there is no blockage.

14 COMMISSIONER MILLER: No blockage? And somebody
15 comes along and photograpns my wire circuit?

16 COMMISSIONER NIMMER: Do you want to give that to Copyright?

17 Do you want to say that is copyright infringement?

18 COMMISSIONER MILLER: Why not? If it were a
19 Calder, why not?

20 COMMISSIONER NIMMER: That is precisely my point. It is not a
21 Calder.

22 COMMISSIONER MILLER: Says who, Mel? Are you the
23 High Commissioner of Artistic Merit?

24 I think that wire circuit is the greatest
25 piece of sculpture I have seen since tne Chicago Picasso!

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1 COMMISSIONER NIMMER: It is true that wire circuits do get
2 into the realm of art.
3
4
5
6
7
8
9

10 We can go to my series of chemical
11 formulae, because, as far as I know, those have not appeared
12 in any gallery yet.

13 COMMISSIONER WEDGEWORTH: Mel?

14 COMMISSIONER NIMMER: Yes.

15 COMMISSIONER WEDGEWORTH: Could I just interrupt
16 for a second, because it seems to me that this point is
17 covered in the committee Report, and they give some
18 examples; but they aren't examples of wire circuits, or
19 chemical formulae, but they are examples that one can
20 reasonably say may not represent works of real authorship
21 that have any long term social value. I think that is my
22 understanding of what you are trying to get at with this
23 question of output.

24 I think that they have a practical point of view
25 on that because it really places the Register of Copyrights

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1 in the position of being the arbiter of cultural artifacts.

2
3
4 COMMISSIONER WEDGEWORTH: And that is probably
5 exactly the way she would like to treat that.

6 Even if we were to pursue that line of thinking,
7 I just don't see how it would be possible, or reasonable,
8 for us to set the Register of Copyrights up in that position
9 because that is the logical end of that line of thought.

10 Somebody has to make a decision as to what the
11 social value of this is; and that is sort of horrendous.

12 I just don't see that that is productive.

13 COMMISSIONER NIMMER: It may end up there. I am not sure,
14 Bob, and if it does, I agree. I don't want to see that
15 happen.

16 The train's running on time doesn't result in
17 that.

18 COMMISSIONER HERSEY: The last colloquy between
19 Mel and Arthur, which ended in kind of a work of art or
20 comedy, I guess, did distress me, though, because I think
21 that one problem here is that if we make our decisions
22 entirely on the basis of lawyerly arguments, we may lose
23 sight of the issues that have to do with social value, and
24 culture, that Copyright was designed to protect. And though
25 they may seem to be semantics and garbage, I can read that

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1 what you said is that a computer program is an author, and
2 I think there is a point of danger to the culture when we
3 admit mechanical processes, or mechanical tools, if you
4 will, as equivalent to human beings who are authors.

5 It is a serious matter, I think.

6 JUDGE FULD: Mr. Lacy?

7 COMMISSIONER LACY: Well, Gabe has a specific
8 point he wants to make on this. I have a more general
9 observation that I would like to make.

10 COMMISSIONER PERLE: Yes. We have specifically not
11 said that a computer program is an author.

12 COMMISSIONER HERSEY: How can there be a derivative
13 work without an author?

14 COMMISSIONER PERLE: I did not say that.

15 The Staff said that and, frankly, I have some
16 problems with the way this particular draft is written.

17 It is a great improvement over some of the prior
18 drafts, and it will not be as good as the next draft.

19 We have not said -- I have not said, and I am
20 sure neither the Judge nor Professor Miller said -- that
21 a computer program is an author.

22 What we have said is that a computer program
23 has an author, and I share with you the concern, down
24 the road, of: Who is the author of the product of the
25 application of the program, and the process that it goes

1 through?

2 But that is not what we are dealing with. That
3 is another part of this Commission's function.

4 What do we do about authorship of the machine-
5 generated work?

6 That is a totally separate problem.

7 We have not covered that. Nobody in the
8 committee has addressed himself to this part of it.

9 So if we could lay that aside -- because I share
10 with you those concerns -- but if you could stop worrying
11 at this stage of the game about: Who is the author of the
12 application of the program-- and just look at, "Who is the
13 author of the program, and what protection is he entitled
14 to", then I think our differences will come much closer to
15 no difference.

16 COMMISSIONER HERSEY: There, you see, I share
17 the concern, as I understand it, that Mel has been putting
18 forward.

19 You can speak of the inventor of an automobile
20 engine as an author, if you want to use that word, but his
21 end product is not, conceivably, a writing. The end
22 product here is a circuit.

23 COMMISSIONER PERLE: No, it is not! The end
24 product is the program. We are only taking it as far as
25 the program. Think of it, if you will, as: The person

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1 the person who wrote the program is writing a book of
2 recipes, or has written a recipe. We are not protecting
3 the soufflé. Nor are we protecting the eggs.

4 COMMISSIONER HERSEY: What you are saying, in
5 effect, is that you are protecting the source program.

6 COMMISSIONER PERLE: No. I am not saying that.
7 I am saying that I am protecting the program that the
8 author created. That is what I am saying. Even if it is
9 a program that converts a source program with an object
10 program, and all the rest of it. The human input creati-
11 vity is what we are talking about.

12 COMMISSIONER HERSEY: Human creativity goes into
13 inventing a wheel.

14 COMMISSIONER MILLER: And you would give a copy-
15 right to a description of how to build the wheel -- not
16 to the wheel, nor to the rotation.

17 COMMISSIONER HERSEY: I would give a copyright
18 in a minute to a source program, in its flow chart form,
19 printed, deposited with the Copyright Office, and registered,
20 sure! But that is not what the computer people want. They
21 want a protection that goes far beyond that.

22 COMMISSIONER PERLE: That is what the committee
23 is recommending: that we are protecting that description.
24 That is all.
25

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1 COMMISSIONER HERSEY: You are protecting a piece
2 of machinery, in the end, and this is the argument: that
3 you are offering protection to something which is appropriate
4 to be protected by another form of law.

5 COMMISSIONER PERLE: I think we have been over this
6 before.

7 You would protect the original flow chart.

8 You would, I assume, protect a photograph of
9 that flow chart.

10 COMMISSIONER HERSEY: Yes.

11 COMMISSIONER PERLE: You would protect a
12 video tape of that flow chart.

13 COMMISSIONER HERSEY: Possibly.

14 COMMISSIONER PERLE: Possibly. I take a video
15 camera --

16 COMMISSIONER HERSEY: In terms of what you are
17 talking about, though, there is some issue as to whether
18 that might be a derivative work.

19 COMMISSIONER PERLE: What I am talking about: I happen
20 to want to deposit my program that I have written, in a
21 form which is perceivable through the intercession of a
22 video machine. The only way I can do that is to put it on
23 video tape. You see what I am driving at?

24 COMMISSIONER HERSEY: Yes. But I still have
25 difficulties with it in terms of the way you are presenting

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1 it here, because it is presented as something quite
2 different -- a derivative work, which needs to have an
3 author, and needs to have a new copyright.

4 COMMISSIONER PERLE: You have not said a word
5 about derivative work in terms of the guts of this report.
6 The guts of this report doesn't say anything about
7 derivative works.

8 COMMISSIONER LACY: A couple of things:

9 For one thing, we often, in these discussions,
10 talked about programs in the abstract; or with very
11 hypothetical examples. I found it sometimes, myself, hard
12 to visualize exactly what we are talking about.

13 Mike Keplinger has assembled examples of several
14 of the catalogues that exist of programs that are offered
15 for sale, or are leased, and these are on the shelf here.

16 After the luncheon break, Members of the Commission
17 might want to take an opportunity to leaf through those
18 to get -- I think they will get -- a much more vivid
19 appreciation of a program as a literary product, as an
20 intellectual product, in reading those descriptions. Also,
21 it makes it very clear that there are literally dozens of
22 programs offered for sale to accomplish the same purpose:
23 maintaining payroll; handling inventories; balancing bank
24 accounts; and that sort of thing.

25 I just suggest this as one way of vivifying,

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1 of making more concrete and more easily conceived, some
2 of the things we are talking about.

3 The second point is a procedural one.

4 I assume that the object of our discussion today
5 is not to arrive at a Report of the Commission -- a final
6 Report of the Commission -- on this; that all of us have
7 assumed that the final decision of the Commission as to
8 the disposition of this, would come after we have had an
9 opportunity to consider the responses of interested and
10 competent witnesses.

11 JUDGE FULD: That raises a question which we will
12 get into later: as to whether we should publish these
13 reports.

14 COMMISSIONER LACY: Precisely!

15 I was going to say that I don't think we need
16 to have reached a decision on our final opinions.

17 I have read John Hersey's memo with some care
18 and, while I don't find it, to me, persuasive of the outcome
19 that he would prefer, I think it is a serious, responsible,
20 and important contribution. I would think, certainly,

21 that it -- or perhaps some summary of
22 it -- ought to be disseminated, along
23 with the committee Report, as one of the documents on
24 which we invite comments, before we reach our final
25 decision.

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1 So I don't think we are under any necessity
2 today of voting up or down in any final sense, on the
3 positions raised.

4 My own feeling about the matter is, to some
5 extent, repetitive of what the committee has said. We
6 are dealing with an important, major form of intellectual
7 product. It is, I think, obvious -- and everybody would
8 concede -- that the creation and dissemination of this
9 type of product contributes to Science and the useful
10 Arts in the United States, and ought to be encouraged
11 by the exercise of powers that Congress is granted under the
12 Constitution.

13 I think we probably all end up agreeing that
14 patent is not an appropriate method of doing that.

15 I think we find difficulty in saying that we
16 should encourage dissemination by keeping programs secret
17 and, hence, in drawing the benefits of Trade Secrets
18 legislation, if one follows thus far, one has the alternatives
19 of either accommodating to Copyright law, or creating a new
20 form of protection that would achieve the goals that we
21 want.

22 I suspect that we would find that the new form
23 of protection would end up saying that creators of copy-
24 righted works ought to have the right to prevent other people
25 from copying their work without their permission, and

1 contributing to its cost; that they ought to be under
2 some obligation to record the existence of the work in
3 which they claim proprietorship and, perhaps, to deposit
4 copies of it;

5 That they ought to be entitled to go into Court
6 and get an injunction to stop people from using their
7 work without authority;

8 That they ought to have an opportunity to
9 collect damages for its unauthorized use.

10 In other words, I think we end up saying
11 that we have Title 2 of the Copyright Act, that reproduces
12 Title I of the Copyright Act and applies it to programs.

13 I think we end up saying that the alternative method
14 that we would come up with is not really different from Copyright.

15 I find it difficult to conceive of a means
16 of protection and encouragement that would not be almost
17 identical with what we are talking about in Copyright. This
18 suggests that there may not be any important reason
19 for bringing the second one up except, perhaps, for a
20 sort of esthetic distaste for assimilating the sort of
21 material that submits the computer programs to works of
22 more genuinely esthetic creative character.

23 I don't find that esthetic distaste, although I
24 share the persuasive argument for duplicative system
25 protection.

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1 I might say finally, that we are not suggesting
2 a leap into extending de novo protection
3 to the programs. The Copyright Office has expressed the
4 opinion that, even under the 1909 Act, there is a probable
5 copyrightability of programs. Congress made, certainly,
6 about as clear as it could, that they are copyrightable
7 under the 1976 Act when it comes into effect.

8 What we really are saying is: Are there such
9 differences?

10 Is this tentative decision of the Congress so
11 pernicious that we are justified in removing/^{it}from Copyright
12 and singling out this class of intellectual effort, and
13 withdrawing the protection that Congress obviously intends
14 they ought to do?

15 We would need, I think, to justify that and discover
16 some real harm that might emerge in the copyrightability of such
17 works.

18 I have some specific questions about a few minor
19 points in the report, but I suspect that we are reaching
20 a point that we would want to adjourn for lunch.

21 I would like to, then, suggest a totally different
22 thing of a practical sort. If we are not, as Arthur
23 suggested, going to meet tomorrow, I suspect a great many
24 of us will want to know that, so we can check out of our
25 hotel rooms.

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1 JUDGE FULD: May I add, before we adjourn, we are
2 going to consider - - and I rather think we all agree
3 that we ought to consider -- the desirability of publishing
4 and disseminating all of the reports of the three or four
5 committees, but we will wait until we discuss the other
6 reports.

7 As to the schedule --

8 MR. LEVINE: I don't anticipate -- unless there
9 is going to be a great deal more discussion on Software --
10 that the Commission will have any difficulty in finishing its
11 business this afternoon. That is entirely out of my
12 hands. I don't know how much additional discussion we
13 would anticipate.

14 I would guess, Mel, that the Photocopying
15 committee will need half an hour, at the most?

16 COMMISSIONER NIMMER: Yes. Right.

17 MR. LEVINE: Perhaps an hour-and-fifteen minutes
18 to an hour-and-a-half for housekeeping things that I want to
19 discuss.

20 That is all.

21 JUDGE FULD: And the other committee on
22 Data Bases?

23 COMMISSIONER LACY: Well, some of the questions
24 about extension of copyright to computer-related products
25 that John has raised applied to data bases, but I think that

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1 that will present a less difficult case than programs;
2 and I would not anticipate any very extensive discussion,
3 especially since we only need such discussion as would
4 enable us to arrive at a decision as to whether the products
5 of the committees are worthy of dissemination, to solicit
6 comments.

7 I would hope that we could plan to adjourn today.

8 COMMISSIONER PERLE: I think we should save some
9 time for a little Executive Session.

10 COMMISSIONER LACY: I would be perfectly willing
11 to meet in the evening. I would like very much to be
12 in New York tomorrow.

13 COMMISSIONER NIMMER: If we are not meeting tomorrow, I
14 may be leaving today, also.

15 COMMISSIONER WEDGEWORTH: I think we ought to
16 be able to wind up today, if we don't break too long for
17 lunch.

18 JUDGE FULD: We will reconvene at 2:00 o'clock.

19 (Whereupon, the meeting was recessed until
20 2:00 o'clock, p.m., on the same day.)

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1 - AFTERNOON SESSION -

2 JUDGE FULD: It is now 2:00 o'clock.

3 We will resume our session.

4 This brings us to the report of the second
5 committee. George Cary will report on the
6 Automated Data Bases problems.

7 COMMISSIONER CARY: Thank you, Mr. Chairman.

8 The Data Bases committee has had several
9 meetings, and our report is available to all of you, I
10 assume.

11 Some of the basic problems that we discussed
12 have already been discussed this morning, and I am not going
13 to burden you further with that. I think I will confine my
14 remarks primarily to a few changes in the Staff version
15 here, which should be made before this goes out.

16 That is, these are my own observations. I do
17 not know whether my other two Committee Members will agree,
18 but I assume that we will all get our chance to make our
19 own suggestions.

20 I have previously touched upon the matter of
21 Deposit. That, I think, was prompted by a statement
22 in the report on page 2 that said: "The Commission should
23 encourage Data Base proprietors to publish and register
24 their copyrighted works, which would create a public record
25 of the existence of the works and, in turn, make possible

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1 public awareness and the utilization of the works."

2 Somehow, I felt that that aim -- which I agree
3 with -- was not met by the final recommendation that the
4 Register of Copyrights just exempt data bases from
5 deposit.

6 It seems to me that some sort of deposit is required.
7 I don't know -- in my own mind, I have not thought it
8 through to that extent -- what should be done, but I guess
9 the closest analogy that I can come to is the situation that
10 the Library of Congress follows in connection with motion
11 pictures.

12 As you probably know, motion pictures that are
13 submitted to the Copyright Office for copyright are received
14 in the Copyright Office. The examiners actually look at
15 and examine the film. It is done on a priority basis so
16 that it is brought in, in the morning, and it is usually
17 ready to go out that evening, the reason being that,
18 they come to the Copyright Office, usually, at the time
19 that it is being run in local theaters. So, if it is brought
20 in that morning, it needs to be shown that evening in the
21 local theater. So the examiner gets his examination over
22 with as quickly as possible.

23 It is returned to the motion picture proprietor
24 with the understanding -- and a signed agreement -- that if
25 the Library of Congress decides, at a subsequent date within,

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1 I think, a 3-year period, that it wants this film for its
2 own collection, that it will request it, and the motion
3 picture proprietor is required to deposit an acceptable
4 copy.

5 Now, this, of course, has several advantages.

6 The Library does maintain a motion picture
7 collection, and it does like to have, in its collection,
8 copies of award winning films of some sorts. So, each year,
9 it makes up its own desired list.

10 Now, it also keeps out of the Library's vaults --
11 and motion pictures do occupy a considerable amount of
12 space; they have to be in air conditioned vaults, and
13 so on -- it keeps them from having this huge amount of films
14 that they really don't want. So it serves the Library's
15 purpose, and it also serves the motion picture ^{owners'} /purposes.

16 Well, something like that sort of thing, it seems
17 to me, might be considered in the case of computer programs.
18 Data Bases -- same thing, I assume -- because, if it is going
19 to serve a public purpose or societal interest, it seems
20 to me that there has got to be something available
21 for an interested party to inspect.

22 Now, if the Library regulations require the
23 deposit of the tapes -- deck of cards -- I don't know what
24 real value this might have as far as the public is concerned,
25 because I would doubt that the Library has facilities to

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1 exhibit these. So you have a deck of cards and a tape
2 which cannot be read. So of what good is it?

3 That is why the Copyright Office now requires
4 a deposit of a printout which can be read by anybody
5 who knows the computer language.

6 COMMISSIONER LACY: Are you speaking now about
7 the committee on Software, or Data Bases?

8 COMMISSIONER CARY: I am talking about the
9 present procedures of the Copyright Office.

10 JUDGE FULD: As to both data base, and as to
11 programs?

12 COMMISSIONER CARY: I don't know that it makes
13 much difference at the moment, at least. I have not
14 formulated that in my own mind. My other colleagues on the Commission
15 might have their own ideas. I am just trying to formulate,
16 in my mind, a general principle that something should be
17 deposited.

18 It may be that, for the first time, as the
19 Software Committee suggests, you could have an
20 alternative to their original recommendation; namely,
21 deposit the original tape, deck of cards, whatever it
22 happens to be, and then -- when this is modified at a
23 later date, as most of them are -- a rather comprehensive
24 description of the changes, so that somebody who comes
25 into the office at a later date and wants to understand

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1 what is involved in this particular deposit, will have
2 available a printout of the original tape, plus a
3 description of the modifications. I think that this is a
4 matter of detail which can be considered at a later date.

5 My point is that I feel that, in some way,
6 there should be some deposit in the office and not
7 necessarily leave it to the Register's discretion.

8 Now, this could be worked out in other ways.
9 For example, a Committee could be appointed -- a Public
10 Service type of Committee -- which could recommend to the
11 Register, and then let the Register make the regulations.
12 But, at any rate, the point I am really getting across is that
13 there should be some requirement of some deposit, so it will
14 be intelligible to a person who needs to inspect the
15 record.

16 That is Point No. 1.

17 Point No. 2 is a little technical in its area;
18 and bear with me for a moment. This has to do with the
19 problem of -- it is mentioned on page 10 of the report. It
20 is talking about the deposit requirement, and it takes
21 the position that you don't have to worry about this because
22 Section 407(c) and Section 408(c) of the law permit the
23 Register to exempt, or recommend that it be exempted.

24 One sentence in there reads as follows: It is the
25 first full paragraph on page 10, and I quote:

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1 "Computer data bases seem well suited for this
2 exemption, for the deposit of an identifying
3 form would achieve the statutory purpose * * *"
4 and this now quotes from the Statute:
5 " * * * providing a satisfactory archival record
6 of a work without imposing practical or
7 financial hardships on the depositor."

8 That is the end of the quote. It cites Section 407.
9 Section 407 is the Section which provides for the deposit
10 of items which the Library of Congress wants and, as you
11 know, there are two types of deposits.

12 There is the 407 deposit which permits the
13 Library of Congress to acquire things that it wants.
14 That has nothing to do with the registration requirement.
15 If you want to register, you deposit under Section 408 and
16 register at the same time.

17 So 407(c) does provide that the Register may
18 exempt categories of material from the deposit require-
19 ments and it says:

20 "Such regulations shall provide either for
21 complete exemption from the deposit requirements
22 of this section, or alternative forms of
23 deposit aimed at providing * * * " and this is
24 where that quote comes from, " * * * a satis-
25 factory archival record of the work without

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1 "imposing practical or financial hardships
2 on the depositor."

3 then it goes on to say,

4 " * * * where the individual author is the
5 owner of copyright in a pictorial, graphic, or
6 sculptural work * * * :

7 Then it sets out certain conditions, there.

8 What I am saying here is that I doubt whether the
9 407(c) requirement--which relates to the Library, not
10 the registration under the Copyright Office -- whether that
11 exemption would be sufficient to permit the report to quote
12 the quotation that I have already read, because I think this
13 applies not to computer programs, or most types of work,
14 but it applies only to the graphic arts type of situation.

15 If you look at the ^{House} Report, the Committee says
16 that they amended this Section by adding that because of the
17 complaints of artists who felt that they should not have
18 to deposit their masterpiece in order to get a copyright
19 on it.

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11 So, on my own situation, I do feel rather
12 concerned about the deposit problem, and I leave my other
13 Commissioner-associates here to defend or knock that one
14 down.

15 That is all I have to say.

16 JUDGE FULD: Does anyone have anything to say?

17 COMMISSIONER LACY: Mr. Chairman, as Mr. Cary
18 pointed out, the committee had not had an opportunity to
19 consider the two reservations that he has made, and I don't
20 agree with them. It seems to me that we ought not to lump
21 programs and machine readable data bases into one category
22 for purposes of considering deposit requirements without
23 commenting on whether there should be a deposit requirement
24 for programs, or not.

25 I would like to point out that a machine readable

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1 program may remain valuable in an unchanged form for a
2 very extended period of time, so that a deposited copy
3 remains a valid and relevant one, perhaps for months;
4 perhaps for years; perhaps indefinitely; and, from time to
5 time, perhaps amended and approved.

6 A Machine readable data base characteristically is
7 updated not later than monthly; typically daily; frequently
8 hourly; often continuously. A deposited copy of a machine
9 readable data base becomes almost immediately obsolete,
10 and is really of no practical use to the Library.

11 In any event it is not, by my definition,
12 inspectable, except by loading it on the machine and
13 addressing inquiries to it, or else having the entire thing
14 printed out at a very substantial expense; and deposit, per
15 se, would seem to serve, nowhere, a useful purpose.

16 However, by taking advantage of the ability
17 to require an alternative form of deposit, it would
18 be possible for the Library through the Copyright Office
19 to require a registration that would be considerably more
20 extensive and informative than the registration required
21 under Section 408.

22 You could achieve something by substituting
23 that for the physical deposit of the tapes. That would
24 really be valuable. That is, a detailed catalogue
25 of data bases that describe precisely their sources; the

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1 kinds of information that could be elicited; the purposes
2 to be served the owner; the means of access; the brokers
3 through which it could be approached; and that sort of
4 thing, would be far more valuable than the physical deposit.
5 Yet, if you require the physical deposit, you lose the
6 capacity to require this alternative.

7 Item 2: I really don't read 407(c) quite the same
8 way, as being relevant only to works of art.

9 Now, 407(c) says: "The Register of Copyrights
10 may, by regulation, exempt any categories of material."

11 I don't see how you could be more explicit!

12 COMMISSIONER CARY: I agree on that.

13 COMMISSIONER LACY: And the second sentence,
14 perhaps, is intended to make an exemption mandatory for
15 works of art. It says it "may do it" for any category;
16 it "shall do it" for certain types of material: pictorial,
17 graphic, and sculptural work, where less than five copies
18 have been published; or it has been published in a limited
19 edition of numbered copies, and so on.

20 I think the only specific reference to works of
21 art is to make mandatory that the discretion to be followed
22 clearly extends to all forms of work; so I really am not
23 troubled with the 407(c) problem at all.

24 JUDGE FULD: Is there anything else to be said on
25 the subject?

1 Mel?

2 COMMISSIONER NIMMER: A couple of points.

3 First, on the deposit point, I think perhaps there
4 is a point to deposit in data bases where they are fluid
5 in their content, which may be particularly relevant there.
6 That is: How does one know the duration, in terms of
7 protection, of a work?

8 Well, under the new law, it is going to be: it
9 may or may not be geared to have to do with publication
10 date.

11 At any rate, in order to determine duration of
12 protection of the data base, a deposit may be helpful because
13 the content of the data base -- changing constantly as it
14 does -- it might, in effect, get perpetual protection unless,
15 as of a given point in time, it were known just what was in
16 it. That does not mean that every time there is a change, or
17 a substitution, or an addition, there must be a deposit so
18 that we have some public record, as of a given time, of what
19 was in it.

20 On the broader question of, indeed, the philosophical
21 question of protectability of data bases, without implying
22 any conclusions I may have on computer programs, because
23 I don't have any firm conclusions yet, and this morning's
24 debate was helpful to me on all views expressed, including
25 my own --

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1
2 COMMISSIONER NIMMER: But whatever problems I might have
3 on computer programs, I don't have with the data base.
4 That is, unless we are prepared to go back and turn back the
5 clock and say the directories are not to be protected,
6 although an argument could be made for that. I don't intend
7 to make such an argument.

8 It seems to me that data bases quite clearly fall
9 within that realm and, hence, should be protectable. So I
10 don't have any misgivings, really, on that.

11 Finally, the Committee Report speaks -- on page 11,
12 at the bottom of the page -- about common law principles on
13 misappropriation being also applicable, and quoting the
14 House Report on that.

15 I have some question. I think, at the very
16 least, it is debatable whether misappropriation is, or would
17 be, applicable to data bases. The House Report, of course,
18 appeared before the amendment on the Floor of the House
19 which took out the explicit reference to misappropriation.

20 So, at the very least, that is a debatable con-
21 clusion; and my own feeling is that it is an incorrect
22 conclusion.

23 COMMISSIONER PERLE: Just getting back to "deposit"
24 for a minute: I wonder if it is necessary for this
25 Commission to deal with "deposit" at all.

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1 Congress has already said that there shall be
2 deposit except in specific cases and, in other cases, the
3 Register -- based upon, we assume, a rational process --
4 may say that the deposit is not necessary, or may put
5 it some other way.

6 Two things are interesting:

7 One of them is that the minute you start
8 discussing whether or not there shall be deposit, you have
9 already said that it is copyrightable. We crossed that
10 bridge, because if it is not copyrightable, it is not
11 deposited.

12 I think that this is something which is so fluid
13 by its very nature, and something which has to be
14 enunciated in accordance with things that we cannot judge
15 -- such as the manpower in the Copyright Office; the
16 storing space available; the money available; new
17 techniques of storing information, and so forth -- that I,
18 for one, think that we should pass and, at most, I think,
19 if we are going to consider deposit, we should make a
20 recommendation that the Register, in adopting rules and
21 regulations, consider this.

22 JUDGE FULD: Both as to software and data bases?

23 COMMISSIONER LACY: That is essentially what
24 the Data Base committee does say. It does not try to
25 prescribe specific regulations, but recommends, rather,

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1 that the Register should adopt appropriate registration/
2 deposit requirements, consistent with the Statutory dis-
3 cretion vested in that Official, to permit and carry, in
4 the registration, periodic updating of identifying material.

5 So it is intended to leave a wide discretion
6 in the hands of the Register.

7 COMMISSIONER PERLE: Right! To go further,
8 I think that we should not even make recommendations. I
9 don't think we need any recommendations.

10 If you really go into the possible functions of
11 deposit, they are evidentiary.

12 Well, first, of course, just to see whether
13 or not, on its face, that which is sought to be registered
14 is copyrightable on its face: Does it conform to the
15 hard requirements?

16 That, once having been inspected, it does not have to
17 be retained. And there may not be a necessity for inspection.

18 Second: The best way in the world to prosecute
19 an infringement action is by taking that which has been
20 deposited, in respect of which there is a presumption
21 that everything that is on the face of that certificate is
22 true. It is very helpful to you in your prosecution of
23 infringement.

24 So, first, Just what the registration itself, is.
25 Does it conform?

1 Second: Evidentiary.

2 Third: Archival.

3 Nobody cares about that in a Copyright sense.
4 We should not be concerned with archival use of deposit
5 accounts.

6 And, finally, the "freebee" for the Library of
7 Congress.

8 I don't think that should be our concern, either.

9 COMMISSIONER HERSEY: There is something more
10 complicated here, though, Gabe, with respect to programs.
11 Allowing the program developers to deposit a description,
12 allows them to hide the idea.

13 I can see that there is a tension here, because,
14 if you insist on deposit, and there is that exposure, then
15 I think that it is quite likely that the program directors
16 would be pressed to drive more and more for trade secret
17 protection--but there is a conflict.

18 If Copyright is, essentially, to encourage dissemi-
19 nation of knowledge, then, allowing a deposit -- which is
20 not only partial, but does not give the essential idea
21 embodied in the work -- then I think you run into serious
22 problems about whether this does encourage dissemination, or
23 whether it does, indeed, enforce the trade secret idea.

24 COMMISSIONER PERLE: I think that becomes a
25 function of how the Register promulgates -- the rules that the
Register promulgates.

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1 I totally agree that ideas should not be hidden.
2 I don't think any of us have tried to do that.

3 COMMISSIONER HERSEY: Oh!

4 COMMISSIONER PERLE: Not the programs. Not the
5 data bases. I think there is a descriptive mechanism that
6 works there.

7 What I mean is: I don't think we should be
8 bogged down by the "deposit" thing. I think that is a proced-
9 ural thing.

10 I think we should be dealing with the philosophy
11 and the substance.

12 COMMISSIONER WEDGEWORTH: I don't disagree with that
13 point of view, Gabe, but I think there is enough involved in
14 this particular procedure that relates to the overall purposes
15 that we are engaged in, in reviewing the law, that I
16 wanted that in the record so that we can -- and there has
17 been enough response to that, so I think we see enough to
18 come back to it later, if anyone wants to comment on it.

19 I would feel very uncomfortable if we were to say
20 that we would not comment on it at all, and allow these
21 procedures to simply develop when, admittedly, there are
22 some things that make us feel very uncomfortable about it
23 in terms of the overall law.

24 JUDGE FULD: George?

25 COMMISSIONER CARY: I would like to reiterate

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1 something that was said this morning; namely, that
2 I don't think we are here to decide this question this
3 afternoon. I merely mention it as something that I think
4 should be considered, so that when these drafts go out to
5 the public for a discussion, this is something that can be
6 considered.

7 COMMISSIONER LACY: Mr. Chairman, I have one comment
8 on Mr. Miller's reference to the problem of avoiding perpetual
9 copyright, and requiring notice on a data base.

10 I really don't think we have a question of
11 perpetual copyright, any more than the New York Times gets per-
12 petual copyright by coming out with a new edition every
13 day. We are not extending the copyright to the data base
14 that has existed in the form for which the term is expired;
15 and this is likely to be pretty purely academic in the real
16 world of copyright data -- machine-readable data bases
17 more than 75 years old are not likely to be subject to
18 infringement.

19 But, if the issue did arise, it is relatively
20 easy to determine the date of the particular form of the
21 data base that is alleged to be infringed, just as to
22 whether it has any data in it that is less than 75 years old,
23 which would demonstrate, if it had that form that was
24 allegedly infringed, that it was one, indeed, where the Copyright
25 had not expired, assuming post-1978 creation.

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1 MR. NIMMER: Dan, I agree that the legal principle
2 is such that it certainly would not be perpetual
3 copyright because, for each contribution, the term is
4 measured from the moment of that contribution. The problem
5 is one of evidence of fact, to know when the contribution
6 was contained.

7 Now, your response to that maybe is an adequate
8 response; namely, that if the data is of a given age,
9 then you can measure the term of protection from the age
10 of the data. But I am not sure that that is correct, in
11 that it seems to me it turns:

12 No. 1, on the kind of data bank involved --
13 whether the material is, itself, sort of self-defining as to
14 its age; and

15 No. 2, whether it is clear that you may not
16 have picked up that data some years later, and put it in
17 the bank. I don't know.

18 COMMISSIONER LACY: The odds are against my
19 being alive in 2053 when this question will first arise
20 for adjudication: as to whether we have a data base whose
21 term --

22 MR. NIMMER: Well, we have to think about
23 duration questions. A 75-year old data bank is not going
24 to be very valuable, anyway.

25 The point is, I would think -- maybe this is

1 unrealistic -- that some data banks, as they are constantly
2 changing, are in a sense ever-renewing, so that, although
3 it started 75 years ago, it is regarded as a currently
4 usable data bank, and not as a 75-year old data bank.

5 But then the question still arises as to the
6 particular matter in it.

7 How old is that matter?

8 COMMISSIONER MILLER: The problem exists today,
9 for example, in the context of certain publishers -- let's
10 say Mathew Bender and Company, which puts out treatises
11 such as Nimmer on Copyright, and there are page changes, annually,
12 each carrying a new copyright year -- copyright notice.
13 Seventy five years is no way of knowing which part of
14 Mel's deathless prose is 76 years old, or 74 years old.

15 COMMISSIONER LACY: That is true of all
16 encyclopedias, too.

17 COMMISSIONER MILLER: Well, in the great hereafter,
18 Mel is going to be on a computer. His treatise will be a
19 data base.

20 JUDGE FULD: That ought to conclude the discussion!

21
22 COMMISSIONER HERSEY: I would like to -- I can't
23 be silent, let me put it that way. I would like to remind
24 the Commissioners that I raised some questions in my paper
25 about data bases, which I don't think we have considered,

1 and I believe they are serious ones. They have to do with the
2 dynamics of data bases, and the relationship between
3 programs which alter the bases, and the data bases
4 themselves, as to proprietary rights; a question of the
5 interactive data base, where the user may, in fact, become
6 the author of the material that is brought out.

7 But to go back to the basic notion, I think
8 there are here, as with programs, very troubling issues.

9 Let me read one sentence from the Data Base
10 Committee Report.

11 "The dynamic process by which a data base changes
12 need not affect the entitlement of the data base to
13 copyright protection."

14 It is a process. While a data base is being
15 changed, a program is operating on it; electrical
16 impulses are altering the form; the exact means of
17 expression, if not the pattern of the data base, some-
18 times may affect the pattern, but this is a process.
19 It is a mechanical process, and I don't think we have dealt,
20 really, with these fundamental issues of the relationship
21 between writings and processes.

22 JUDGE FULD: I envisage that both of these
23 reports will be published and disseminated, and we will
24 react to the responses that we get.
25

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1 COMMISSIONER HERSEY: Yes. I think I am going
2 beyond that, and asking whether the Data Base committee
3 won't consider some of these questions that have been
4 raised.

5 JUDGE FULD: You can ask them.

6 COMMISSIONER LACY: I really don't understand the
7 last point.

8 If I have a data base, let's say, consisting
9 of titles and abstracts of articles that appeared in a
10 chemical journal, and I maintain that as a dynamic, on-
11 going data base, but I keep ordering into it as each new
12 issue of the chemical journal comes to my attention --
13 the author, title, and abstract -- and record that as one
14 would, whatever the final form, and as magnetic-- magnetiz-
15 ed particles on a magnetic tape -- whether that tape then
16 operates the typesetting machine to print the revised
17 version, or whether it is used to modify the content of
18 a set of disks on which it is recorded, I really just
19 fail to grasp the difference from a copyright point of
20 view.

21 COMMISSIONER NIMMER: Also, John, I understand --

22 COMMISSIONER LACY: I am really not being argumen-
23 tive.

24 COMMISSIONER NIMMER: I understand what you are saying
25 about the process. That goes back to our discussion of

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1 this morning. But that, it seems to me, is quite distin-
2 guishable from that which is achieved by the process.

3 That is, to take Arthur's suggestion about my book.

4 Every year, I tell my publisher, "I want to
5 replace pages X, Y, and Z with replacement pages."

6 My telling him that is a process, but the replaced
7 pages are new matter, which are subject to copyright.

8 Whatever you think about whether my instructions
9 should be regarded as protectible is a separate question to
10 whether the new pages are copyrightable.

11 Isn't that what the changing data base is about?

12 It is new output.

13 COMMISSIONER HERSEY: Well, I don't know. The
14 problem comes when we have complex transactions in which
15 two or three programs, and two or three data bases may be
16 relating to each other. I think it is terribly hard
17 to know where the process begins; who the author is at each
18 stage, and so on.

19 I think we have not really dealt with what happens
20 within the machine, in terms of copyrighting. If it were
21 just a matter of what comes out in the end, that would be
22 one thing, but there are issues of where the proprietary
23 rights would lie.

24 COMMISSIONER NIMMER: That becomes a factual question, but
25 it is not a difficult legal question.

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1 COMMISSIONER WEDGEWORTH: Just to respond
2 briefly, John, I don't think that the committee has
3 ignored the questions that you raised in this paper.
4 I think we did discuss them, and I particularly raised a
5 number of questions about the characteristics of dynamic
6 data bases, and how this did fit into Copyright, as we
7 know it.

8 I think that we did feel comfortable with the
9 results of that discussion, and I think if you look at the
10 traditional kind of compilation -- say, a given author
11 who might spend a lifetime as a scholar, developing
12 a definitive dictionary -- to suggest that being able to
13 do this in a much shorter period of time by the nature
14 of changes in data bases is a change in order of magnitude,
15 but I am not sure that we can really determine that it is
16 a change in the whole nature of making compilations.

17 The question is that, on the question of fixation,
18 at some given point in time, we can tell exactly what that
19 compilation is, even with highly volatile data bases.

20 It is not to ignore some of the difficulties that
21 you perceive with this machine communication and manipula-
22 tion, but I am just not really sure -- I draw the same
23 conclusions from that that you do.

24 We did go over this rather carefully. We were
25 not sure. We raised the issue about perpetual copyright; and

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1 what the significance of that was; and the fixation problem.

2 JUDGE FULD: Gabe?

3 COMMISSIONER PERLE: I have a feeling that Mr.
4 Hersey's problem goes back to something that we have not
5 dealt with, and I think the New Works Committee
6 will have to go back into, which is: given proprietary
7 elements, and given programs that interact, and all the
8 other magic words, the machine produces something else.

9 Who is the author?

10 Who owns the rights?

11 What is the proprietorship?

12 That, I think, is at the base of some of the unrest
13 that has come up, and I think, pervades John's paper.

14 I think we have to have some answers to that, and I think
15 it is up to the/ New Works committee to come up with some of the
16 answers to, "Who does"?

17 JUDGE FULD: You are referring to the committee
18 on New Works?

19 COMMISSIONER PERLE: "New Works".

20 I think we have to have their input, because
21 if we don't get that committee's input, we are going
22 to have to supply our own.

23 COMMISSIONER HERSEY: Thank you for defining my
24 problem.

25 COMMISSIONER PERLE: Well, at least I have that

1 unrest in reading this. I feel that that is a key portion,
2 anyway.

3 COMMISSIONER WEDGEWORTH: Which is one that we
4 considered already defined out of our charge, by the
5 establishment of the committee.

6 COMMISSIONER HERSEY: Except that I have the
7 impression that we did decide that there was no such thing
8 as "computer created works"; so we were going to dissolve that
9 Subcommittee.

10 MR. LEVINE: No. I don't think that committee
11 considers itself dissolved.

12 COMMISSIONER KARPATKIN: We aren't dissolved. We just
13 have no business!

14
15 JUDGE FULD: I think with that, that we can
16 turn to the report of the third Committee.

17 COMMISSIONER LACY: Mr. Chairman, I had not
18 realized that we were going to go straight to data bases
19 right after lunch, because there was one more point
20 I would like to raise about software, if I may.

21 JUDGE FULD: Surely.

22 COMMISSIONER LACY: It will not be extensive.

23 What I say won't take over a couple of minutes.

24 The committee Report has a rather sweeping
25 indication that the availability of copyright for computer

1 software should extinguish the ability to rely on
2 secrecy for the protection of software.

3 While I am sympathetic with that, I am a little
4 bit concerned about the precedent that might have for
5 some other kinds of copyrighted works, and maybe the same
6 concerns apply to software, too.

7 Every trade secret -- well, not every, obviously
8 -- but almost all trade secrets are presumably embodied in
9 the written document at some stage.

10 My friend in the Coca Cola Company tells me that
11 there is, written down on a piece of paper, the formula,
12 which is locked inside of a safe, inside of a vault, inside
13 of a locked cage, to which three or four people only
14 have access. Nevertheless, it is written. And, if it
15 is written down again, after January 1st, it will be under
16 copyright and the proprietor will have no choice about
17 it being under copyright.

18 The only way he could get it out of copyright
19 would be to publish it without a notice, which would
20 defeat its purposes.

21 But, if he leaves it in copyright, then, if the
22 doctrines proposed here for software were applied to all
23 other documents, he would lose any trade secrecy protection;
24 and trade secrecy protection goes to a number of things that
25 copyright does not.

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1 It is possible to violate a trade secret without
2 infringing/^acopyright, by communicating the trade
3 secret orally. For example, by going to work for another
4 employer and using the trade secret that you acquired in
5 your prior employment in the new job.

6 I wonder if we have examined with sufficient care
7 this extinction of trade secrecy protection in software
8 for areas where the kind of protection -- I can see very
9 well that the kind of protection that Copyright gives, one
10 might not, perhaps, seek under trade secrecy; but there are
11 kinds of protection involved in trade secrecy that are not
12 really copyright matters at all.

13 Let us assume that Time/Life has brought to
14 fruition a plan for a brand new magazine that has a really
15 hot idea that is bound to make a lot of money. Obviously,
16 it is written on a document that says, "Strictly Confidential"
17 and there are a lot of copies, but, nevertheless, you have a
18 copyrighted work.

19 Suppose an employee of Time/Life goes to work
20 for McGraw Hill, and he tells us all about this hot new idea,
21 and we beat Time/Life out of it. We have not infringed
22 any copyright, but have the fact that your trade secrets
23 are involved in a copyrighted document, and use of
24 trade secrets is not remedied.

25 COMMISSIONER PERLE: Nicely put!

1 COMMISSIONER LACY: It could be the other way
2 around.

3 COMMISSIONER WEDGEWORTH: A good Ethics Code
4 might help.

5 JUDGE FULD: We can give it thought, yes.

6 Is there anything more to be said on the subject
7 before we go to the Photocopying Committee?

8 COMMISSIONER HERSEY: Where do we stand on the
9 programs?

10 JUDGE FULD: The plan, as I understand it, was
11 that it would be desirable to have the reports that have
12 been made, corrected in any way -- or revised in any way --
13 that we want; then published and disseminated; and then we
14 will wait for responses from those who receive them; and
15 then have the Commission determine, on the basis of the
16 reports and the reaction to them --

17 COMMISSIONER HERSEY: I take it the Commission
18 will have an opportunity to discuss the next draft of the
19 committee?

20 COMMISSIONER LACY: I move that we not do that.

21 This would mean that we would not examine it until
22 July; it would not be distributed until August; it would
23 be September or October before we begin to get replies;
24 and our redraft, subsequent to that date, would take
25 another couple of months. We would want to send that out.

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1 JUDGE FULD: As I envisage it, I thought there would
2 be corrections made; then it would be disseminated; then it
3 would be circulated to the Commission as well as to the
4 public and then, after we got responses, we would then --

5 COMMISSIONER HERSEY: I am troubled by this,
6 because of a fundamental difference that I have with the
7 present draft. It is one that I don't think we really
8 came to grips with this morning.

9 The computer program is a process from beginning
10 to end, and the present draft of the committee breaks
11 the complete program up into its various phases, as if
12 they were different things.

13 A computer program is designed to do mechanical
14 work from beginning to end, and it is misleading, I think,
15 as in the present draft -- as the committee puts it --
16 to suggest that the source program, or the description
17 in human, readable form, is what is being copyrighted;
18 and that another work which comes from that, which is the
19 object program, is a work that must be copyrighted
20 separately, later on.

21 JUDGE FULD: I think the views have all been
22 aired.

23 Would it not suffice if you received a
24 corrected copy of the committee's report, and responded
25 to it?

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1 Gabe?

2 COMMISSIONER PERLE: I was going to say that you
3 have already said that you would circulate Mr. Hersey's
4 memo.

5 JUDGE FULD: Yes.

6 COMMISSIONER PERLE: Just for the record, I will
7 not discuss -- but I certainly do not accept -- the
8 characterization just made. But I think that further
9 discussion is unnecessary.

10 I think for the purpose of getting public comments,
11 as well as the comments of the other Commissioners, it is
12 essential to get these out as soon as possible.

13 COMMISSIONER KARPATKIN: Couldn't we add to each committee
14 Report, before disseminating it, any additional comments
15 that any Commissioner wishes to make, and have it circulated?
16 In that way, we would circulate not only the majority'
17 report, but any other ideas which any Commissioner feels
18 are worthy of consideration by the public.

19 COMMISSIONER LACY: I fully support that, Mr.
20 Chairman. This morning, I indicated that it was essential
21 that Mr. Hersey's memorandum go out, along with the reports
22 of the two committees. I would certainly add to
23 that the comments of any Commissioners who wanted to put
24 in comments.
25

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1 JUDGE FULD: Not to be added to the committee's
2 report, but to be the report of the particular Commissioner?

3 COMMISSIONER KARPATKIN: No. I would group it as one thing.
4 I would have the report and then, following the report,
5 I would have a page that says, "Comments of Commissioners"
6 by name, "concerning this report".

7 COMMISSIONER LACY: And dissenting and concurring
8 opinions?

9 COMMISSIONER KARPATKIN: It is too early for that.

10 JUDGE FULD: I think there is a time factor
11 involved.

12 COMMISSIONER KARPATKIN: Put a time limit by which the
13 staff will receive these. It will take them a while to
14 get it under way, anyway.

15 JUDGE FULD: A couple of days.

16 MR. LEVINE: Those who are familiar with the
17 Copyright studies done in the Fifties and the early Sixties
18 recall that there was a report, and a study, and then, at
19 the end of the report, there were a series of comments by
20 interested parties who reacted.

21 JUDGE FULD: Well, the reports that are being
22 circulated, or that we plan to circulate, are the reports
23 of the committee, not the report of the Commission.

24 I don't see any harm in it, except that it is
25 time consuming.

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1 COMMISSIONER LACY: I have no wish to cut off
2 the discussion of the issue. I would just like to draw
3 the general interested public into the discussion
4 by laying before everybody, all of these points, and
5 inviting everybody to comment on it; not keeping it as a
6 private discussion within the Commission until we have
7 reached unanimity.

8 JUDGE FULD: Well, I suggest that each Commissioner
9 append what he wishes as his or her report; or his or
10 her observation.

11 COMMISSIONER NIMMER: Comments.

12 MR. LEVINE: I think if these go out something
13 like June 1, or thereafter, it is not going to, in terms
14 of the next Commission meeting, or the one after, inhibit
15 us in terms of comments.

16 COMMISSIONER LACY: Do you intend to invite
17 comments at this August meeting?

18 MR. LEVINE: Well, we are not having an August
19 meeting. We will have a September meeting at which the
20 six Library Associations will be testifying.

21 COMMISSIONER LACY: We need a meeting. If you
22 got it out the first of June, I think that would be
23 sufficient time for people to prepare their comments, written
24 comments, and those who seem to have something of merit
25 could then be invited to present oral comments at the

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1 July meeting.

2 MR. LEVINE: The July meeting, I am afraid, will
3 be probably fairly filled with reports from our several
4 contractors.

5 COMMISSIONER LACY: I am distressed because
6 that means it will be October before we get any Public
7 feedback from these things in to the Commission.

8 I really begin to feel time pressing in on us
9 because we are certainly going to want to revise these
10 reports, perhaps extensively, in light of the comments
11 received in October. We can review those, maybe, in the
12 November meeting and get them out again.

13 I wonder if we couldn't plan on an August meeting?
14 People tend to vacation in January more than they do in
15 August, these days.

16 JUDGE FULD: I won't be here in August.

17 COMMISSIONER WILCOX: There could be a longer meeting in
18 September.

19 MR. LEVINE: We can have a three-day meeting
20 in September.

21 COMMISSIONER LACY: I really don't think we
22 can afford to have the responses wait until October.

23 JUDGE FULD: The first thing is the format for the
24 report of the additions that the Commissioners choose to make.
25 Is it desirable to have it as an Appendix to each of the

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1 committee reports; or is it desirable, or more helpful,
2 to have the individual comment of each Commissioner
3 that wants to add something?

4 I would think it is the latter.

5 COMMISSIONER LACY: What we want to consider is
6 the possibility of having some of these responses to what
7 we send out -- written responses, of course, would be
8 read as they come in, I assume, at the meeting. But if
9 there are witnesses who want to be heard orally, could that
10 be considered a possibility that the committees could
11 hear those witnesses, and any Commissioner who was not a
12 member of the committee but was interested in the
13 subject would be free, of course, to sit in on them.
14 In that way, we might have some committee meetings
15 during this interval for that purpose.

16 COMMISSIONER WEDGEWORTH: Again, I share your
17 concern about this, but I was just thinking that it is
18 going to be as difficult, for the people who wish to respond
19 to these papers, to get organized that quickly, as it appears
20 to be for us to get together during that time period.
21 If we can schedule our September meeting in such a way
22 that we can get some early responses, I think that is a
23 realistic schedule.

24 COMMISSIONER LACY: My guess is that we are going
25 to have two full days of serious witnesses commenting on these

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1 computer things.

2 JUDGE FULD: Whether it is in August or
3 September, would it make very much difference?

4 COMMISSIONER LACY: No, if we are prepared to
5 meet for four days in September.

6 JUDGE FULD: Well, we will see how much time is
7 needed when we get the reactions and the responses from
8 the outside.

9 COMMISSIONER LACY: I am perfectly willing to leave
10 it to you and the staff. I just do feel a deep sense of
11 urgency about this. I feel we may be underestimating
12 the time that it is going to take us to go through, perhaps,
13 two or three rounds of revision and comments, and
14 counter-revisions.

15 COMMISSIONER WEDGEWORTH: Mr. Chairman, I think
16 -- to make a comment as a librarian as well as a member
17 of the Commission -- for those who are receiving the
18 reports, it might be helpful to have the comments related
19 to the appropriate report; rather than having them
20 separate, so that the documents organize themselves.

21 JUDGE FULD: Do you mean physically added to
22 the committee Report?

23 COMMISSIONER WEDGEWORTH: Yes. If you have comments
24 to make on the committee Report about Data Bases, then
25 they would appear as an Appendix to that committee

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1 Report, and the Software Report, likewise.

2 COMMISSIONER KARPATKIN: I think that would be better,
3 too.

4 JUDGE FULD: All right. That will be satisfactory.

5 I assume, for instance, talking about the Software
6 Committee, the final or corrected draft will be completed
7 in a week or so?

8 COMMISSIONER PERLE: Or so.

9 COMMISSIONER MILLER: I don't think that John would
10 ever acknowledge that there could be a corrected draft.

11 COMMISSIONER LACY: Thank you. An amended draft.

12 COMMISSIONER PERLE: That should be completed in
13 a couple of weeks?

14 JUDGE FULD: There should be a week, perhaps,
15 given to those who want to respond after the receipt
16 of the final draft of the respective committees.

17 COMMISSIONER WILCOX: Is it clear that John's internal
18 document will be sent out?

19 JUDGE FULD: Yes, as he wishes to change or
20 modify it in any way.

21 COMMISSIONER WILCOX: Secondly, I would hope that it
22 would be rather clear that these are preliminary reports
23 only of the committee.

24 JUDGE FULD: Committees, but not the Commission.

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MR. LEVINE: We had just prepared, prior to this, a draft of a letter that we might send in which we say:

" CONTU has designated a Software Committee to prepare a preliminary report in its area of responsibility, to serve as a basis for Commission discussion. The Committee has prepared the attached preliminary report to set forth its conclusions and recommendations to the full Commission. These recommendations are intended by the Committee to fulfill the Commission's mandate, set forth in Public Law 93-573.

At the request of the Software Committee,
the Commission is circulating this report as a
working draft, in order to secure further
comment and testimony.

It must be emphasized that the recommendations and conclusions reflected in this report have not been adopted by the full Commission. The Commission urges you to communicate to it your opinions regarding these proposals, or suggestions, for alternative approach.

Requests
Comments are requested. /for the opportunity to
testify before the Commission on these proposals
should be addressed to

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1 JUDGE FULD: I think there ought to be a reference
2 to the additional reports, separate and apart from those.

3 MR. LEVINE: We will now have to do that.

4 We will have to include that -- the comments.

5 COMMISSIONER KARPATKIN: Don't we also want to indicate --
6 that there is such an air of finality, as if but for the
7 testimony that we are soliciting now, the committees have
8 reached their conclusions. I think it would be more
9 becoming for us to indicate that we have a number of
10 contracts out, and that we are waiting to get the results
11 of those before reaching what you call conclusions. We
12 have the NYU study, and the other one, and the public
13 group, and I really do feel that it looks as if we pre-
14 judged without the benefit of those studies.

15 MR. LEVINE: All right. We can put that in.

16 Just as an aside, the NYU study came in this
17 morning, so that is completed, and we will circulate that
18 to the Commission.

19 It is a very lengthy document.

20 JUDGE FULD: I, as a Commissioner, am not prepared
21 to take a position that is definitive and final until
22 I read the reports and the responses from outside; and
23 the responses from within the Commission.

24 I think that is true of all of us.

25 MR. LEVINE: I can say that these are merely

1 tentative reports which require modification based
2 upon a number of factors.

3 JUDGE FULD: Now, may we return to the Photocopying
4 committee's report?

5 ORAL REPORT OF COMMITTEE

6 ON PHOTOCOPYING

7 COMMISSIONER NIMMER: Thank you, Mr. Chairman.

8 We have three points to report upon, only one
9 of which, I think, will take any time; and perhaps it won't.

10 The first point: The point was made in our
11 Committee meeting that there is a great deal of confusion
12 and uneasiness, among librarians, as to the meaning
13 of Section 108 in its application. There is a good deal
14 of ambiguity, it is felt. It was thought -- and our
15 Committee agreed, subject to the Commission's agreement --
16 that we could serve a useful function by attempting, in a
17 sense, to use our good offices to get agreement between
18 the interested groups on certain key ambiguous issues and,
19 perhaps, ourselves, at a later date, contribute to some
20 clarification of these points.

21 To give you an example of the kinds of points
22 that were suggested, we recalled, in connection with
23 108(e), the question is whether or not copies are available
24 upon a "reasonable investigation" -- copies available on the
25 market.

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1 So, what constitutes a "reasonable investigation"?
2 What are the hallmarks of such an investigation?
3 What are the indices of such an investigation?

4 Conceivably, nothing can be said that is definitive
5 on this but, perhaps, something helpful -- some guidelines --
6 helpful on this question can be evolved.

7 There was a similar question on: What is an
8 authorized reproducing service -- which is one of the groups
9 you turn to, according to the House Report, in determining
10 whether or not copies are available on the market: whether
11 they are available at a fair price.

12 What is a "fair price?"

13 Is a fair price different than the market price?

14 And questions of that sort.

15 What is the status of libraries in for-profit companies
16 under 108?

17 The House Report deals with that matter, but not
18 completely so, I think, and this is an area where perhaps
19 some clarification could be reached -- could be found.

20 Well, obviously, there are other questions.

21 The thought of the Committee was that we
22 should send a letter to interested groups inviting them
23 to suggest issues that are of concern to them, of this sort --
24 not going beyond 108 -- making clear that we are not
25 suggesting, or re-opening 108, or going beyond it in any

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1 way, but simply by way of clarification of what is in
2 108; what does it mean in the various areas; asking
3 these groups, if they are concerned with such clarification,
4 to specify the issues -- the specific issues -- that
5 they think need clarification.

6 We might, ourselves, throw out to them some such
7 issues to give them an idea of what we have in mind; ask
8 them to then submit such issues; and then the thoughts of
9 our group, I think, was further -- correct me if I am
10 wrong -- that we would then suggest initial meetings
11 between the groups themselves to try and reach some
12 accommodation, and then, at a later stage, we ourselves
13 would get involved in this and, ultimately, perhaps, issue
14 some guidelines similar to those that we previously
15 imposed or specified.

16 Let me emphasize that our Committee does not see
17 this as our major function in connection with the
18 Commission. We think our major function is the long range
19 issue of photocopying and how it is to be handled;
20 and not what is to be done under the existing Act. But,
21 nevertheless, we think a valuable service can be con-
22 tributed by doing this.

23 So that is the first item that we have tentatively
24 decided to pursue, subject to the Commission's agreement.

25 JUDGE FULD: Are you going to put this in writing?

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1 COMMISSIONER NIMMER: Yes. Yes. But I hope it does not
2 have to come back to the Commission for approval.

3 JUDGE FULD: No. It is going to reflect what
4 you have just stated.

5 COMMISSIONER NIMMER: Right. Yes.

6 JUDGE FULD: Does anybody disagree?

7 COMMISSIONER PERLE: Do you want a resolution?

8 COMMISSIONER NIMMER: Apparently, there is consensus.

9 The second item--actually the third in what we
10 discussed, but let me get it out of the way, because the
11 third one may require some discussion -- the second item
12 simply has to do with our long range objectives.

13 This Committee -- unlike the other Committees,
14 as you know -- has not as yet evolved even a draft of
15 our recommendations. We started behind the others by
16 Commission decision as to what we would look into initially;
17 and our hearings followed those on other subjects. There are several
18 different studies under way now that will be coming in, in
19 May, June and July, having to do with photocopying.
20 We intend to have a day-long meeting prior to our Commission
21 meeting in July, and another one thereafter, so that we are
22 very much aware of the need to articulate a draft of our
23 long term recommendations, and we are planning that but
24 we do not have it, as yet. I suppose that is all I can
25 report in that regard.

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1 The third point has to do with a request from
2 the publishers. Since the request was not made directly
3 to me, perhaps either Arthur or Bob should report on that.

4 MR. LEVINE: It was made to Bob.

5 MR. FRASE: The Association of American Publishers
6 approached the Staff of the Senate Subcommittee with a
7 proposal, for an amendment to the CONTU Bill which would
8 permit them to get together and discuss the kind of
9 copyright payment system which they described to us on March
10 31.

11 They were turned down there, so they next went to
12 ask for the support of the Register of Copyrights/and met with
13 her a few days ago.

14 They would also like our support with the Depart-
15 ment, to try to get a letter from the Department of Justice
16 permitting them to do so; and this would be on a specific
17 understanding that the letter requested from the Department
18 of Justice would relate to a scheme in which the individual
19 publisher would set the prices on the individual copyrighted
20 works. There would be no blanket flat fee, or even any
21 schedule of fees. It is up to the individual publisher
22 to price each individual article.

23 JUDGE FULD: Do you want to address that?

24 COMMISSIONER NIMMER: Well, just in terms of our Committee
25 decision this morning, subject, of course, to the Commis-

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1 sion's approval.

2 We voted to indicate to the Justice Department
3 -- we may have a letter specifying it. Is that prepared?

4 MR. LEVINE: Yes. This was just drafted, in
5 response to a request from the Association of American
6 Publishers. This would be addressed to -- we are not sure
7 yet; either the Attorney General or the Assistant Attorney
8 General for the Anti-Trust Division.

9 "In response to a request from the Association
10 of American Publishers, the National Commission on New
11 Technological Uses of Copyrighted Works recommends that
12 members of that Association * * * " This will require
13 some working over. " * * * receive from the Department
14 of Justice, the appropriate assurances that no Anti-Trust
15 action would be taken against them, should they discuss the
16 creation of a joint venture which would serve as a Royalty
17 Payment Center for compensating owners of copyrighted and
18 photocopied works.

19 "Such discussions should be in the best interest
20 of the Author/Publisher/Library/User communities, in that
21 they could lead to at least a partial solution of some of the
22 thorniest problems which Public Law 94-553 addresses,
23 but does not resolve.

24 "This request should not be construed as in
25 any way indicating approval with respect to plans which might

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1 result from further discussions."

2 COMMISSIONER NIMMER: In other words, we want to approve
3 their talking, but not approve, in advance, anything they
4 may agree upon. We want the Justice Department to approve
5 only the talking.

6 JUDGE FULD: We are not taking any position on
7 the final result.

8 COMMISSIONER NIMMER: Right. Yes.

9 COMMISSIONER LACY: John was just saying that
10 we should be reminded that we agreed -- have we not -- that
11 we would check with Charles Lieb and Irwin Karp to see
12 whether this letter will serve their purposes. They may
13 feel it is so weak that they would rather not have it at
14 all, but they may really want more than this. I would not
15 be prepared to recommend more than this; but we should
16 check with them, personally.

17 JUDGE FULD: Are there any other views as to
18 the form of the letter?

19 COMMISSIONER PERLE: Do we need a motion?

20 JUDGE FULD: Is anyone opposed to it?

21 Is anyone opposed to sending a letter such as
22 this?

23 COMMISSIONER KARPATKIN: May I ask a question?

24 Would it impede the discussions if a member
25 of the CONTU staff were present during the discussions?

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1 MR. LEVINE: This was suggested by Bob Wedgeworth.

2 I will suggest that to the parties. My difficulty
3 was that I don't want to be necessarily sitting in and saying,

4 " Now you are really in violation of the
5 Anti-Trust laws!"

6 I don't want to be, necessarily, put into that
7 position.

8 MS. WILCOX: You said "staff member". It could
9 be Commissioners, couldn't it?

10 MR. LEVINE: You said "staff".

11 MS. KARPATKIN: I said "staff". It could be a
12 Commissioner too, probably.

13 COMMISSIONER PERLE: I, for one, feel that this
14 is something they should bring to us. We should not be a
15 participant in it.

16 JUDGE FULD: Who should bring it to us?

17 COMMISSIONER PERLE: The A.A.P.

18 JUDGE FULD: They have!

19 COMMISSIONER PERLE: Let them work out their own
20 program, and then bring it to us. If we have either a
21 Staff member or a Commissioner sitting in on the discussions
22 as anything more than a kibitzer, and a reporter, we, at the
23 minimum, imply condoning that which they are concluding.

24 MS. KARPATKIN: Well, we have already condoned it,
25 now.

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1 COMMISSIONER PERLE: No. No. I mean: that which
2 they are going to come up with. I think we ought to give them
3 mechanical ability to discuss, and then let them present it
4 to us. I don't think we ought to have anybody present
5 during the discussions.

6 COMMISSIONER KARPATKIN: I would feel more comfortable that
7 the discussions were in the public interest if a representa-
8 tive of the Commission were there as an observer.

9 I don't have any feeling that we ought to
10 participate in any way except perhaps as a resource, but
11 I do feel that the presence of a Commission member, or a
12 Commission representative -- staff or member -- would
13 make the situation a little cleaner.

14 COMMISSIONER LACY: I think there are practical
15 problems. I don't envisage these discussions as being a
16 formal meeting of the Committee from 2:00 to 4:00 on a given
17 afternoon. I suspect a lot of it is going to be done over
18 the 'phone, and back-and-forth correspondence:

19 "Earl, would you be willing to take part in a
20 plan like this?"

21 "No! I would not because so-and-so supposedly
22 did this-or-that."

23 "Would that meet your objections?"

24 I think there is just going to be an enormous
25 amount of discussion--one-to-one telephone discussions--

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1 committee meetings; there, obviously, could be some formal
2 committee meetings toward the end, but those are likely to
3 be ratifying the general discussions that have taken place.

4 JUDGE FULD: This letter is very neutral in its tone.

5 COMMISSIONER NIMMER: Apparently, there is agreement on the
6 letter. There is a question whether it should be conditioned
7 by us having a representative.

8 JUDGE FULD: Is this the thought of the Commissioners,
9 that we have a Commission representative present?

10 COMMISSIONER KARPATKIN: I would so move.

11 COMMISSIONER WEDGEWORTH: I would second, and speak
12 to it briefly.

13 I brought the idea up to Arthur because I felt
14 that if the Commission were going to be in the position of
15 supporting the development, it ought at least to have some
16 assurance that the discussions were going along the lines
17 that we were asked to foster; and it might help the development
18 of our own thinking just to have some information.

19 While it is true, Dan, that there is likely to be a
20 lot of informal back-and-forth, I think that if we indicate
21 that this is something that we would like to see, it would
22 not be too much trouble for them to call a formal meeting
23 from time to time as these discussions progress.

24 JUDGE FULD: You heard the motion.

25 It has been seconded.

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1 All in favor of it?

2 EIGHT COMMISSIONERS: Aye.

3 JUDGE FULD: Opposed?

4 COMMISSIONER LACY: Opposed.

5 COMMISSIONER PERLE: Opposed.

6 JUDGE FULD: The motion is passed.

7 We will have a representative present, when
8 possible .

9
10 Is there anything further to be said about
11 Photocopying?

12 (No comments)

13 COMMISSIONER NIMMER: That completes our report.

14 JUDGE FULD: You are going to circulate the report
15 to the Commission?

16 COMMISSIONER NIMMER: Do you mean the request for the issues?

17 JUDGE FULD: Yes.

18 COMMISSIONER NIMMER: I guess so. We will circulate that.

19 JUDGE FULD: This brings us to the final item
20 on the agenda, which will be discussed by Arthur Levine. It
21 is Commission Business.

22 COMMISSION BUSINESS

23 MR. LEVINE: Before we get to the items that are
24 on the agenda, one thing was left unclear on this report,
25 and that is deadlines as to comments from the Commissioners.

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1 JUDGE FULD: One week after the receipt --

2 MR. LEVINE: One week. Fine!

3 JUDGE FULD: That seems to be satisfactory, Rhoda?

4 COMMISSIONER KARPATKIN: Yes.

5 COMMISSIONER LACY: May I just clarify in my own
6 mind, to make sure I understand and we all understand
7 the procedures: I take it the Commission Staff will take
8 the two reports, the Software and Data Bases committee
9 reports, and amend them in the light of this discussion
10 with any suggestions from the committees; do that
11 promptly; and circulate these, then, to all Members of the
12 Commission. We will have an interval -- a week has been
13 suggested; I think ten days might be better.

14 JUDGE FULD: Ten days.

15 COMMISSIONER LACY: -- to send in any comments.

16 JUDGE FULD: That takes care of the weekend.

17 COMMISSIONER LACY: That is what I was thinking.
18 To send in any comments they wish, which will then be
19 appended to these reports.

20 The reports will then be mailed out to all
21 organizations or persons that the Staff has reason to believe
22 will be interested in them.

23 I assume also that the availability of these
24 would be announced in the Federal Register, or in appropriate
25 publications.

1 COMMISSIONER PERLE: Would you want them published
2 in the Federal Register?

3 COMMISSIONER LACY: I think that is an excessive
4 burden on the Government Printing Office: to print the
5 tens of thousands of copies going out to people who are
6 not interested.

7 Then there will be an interval in which written
8 comments will be received. There will be requests, also,
9 that will be submitted, to be heard orally. Then the
10 Commission and its Chairman and the Staff
11 will consider scheduling such sessions with the full
12 Commission, or committees, to hear those who requested
13 oral testimony. I assume we don't necessarily commit
14 ourselves to hear everybody that asks to be heard, but those
15 who seem to have something useful to say. I can conceive
16 of you getting a lot of duplicative and repetitive requests.

17 JUDGE FULD: Comments will be made, then, by
18 each of us, of the desires, within ten days after the
19 receipt of the Committee reports.

20 MR. LEVINE: On Monday, there was a meeting in this
21 room convened by PISA, of public interest organizations --
22 representatives of public interest organizations. I cannot
23 begin to summarize the full day's discussions. They
24 began at 9:00 in the morning and, with a brief lunch break,
25 continued until 5:00 in the afternoon.

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1 There was very wild discussion.

2 I think the purpose of the meeting -- which was to
3 elicit interest and comments from public interest organiza-
4 tions -- was certainly fulfilled.

5 PISA will be preparing a report of that meeting.
6 PIEC -- Public Interest Economic Center -- will be revising
7 its report as a result of the meeting on Monday, and will
8 issue another report on May 30th -- the revised report,
9 on May 30th -- which I will circulate to everyone, again.

10 On June 13, the group that met on Monday will
11 reconvene here for a second meeting. After that, PIEC will
12 prepare its final report. PISA will prepare a report on
13 the discussions and on the issues as they see them, and
14 both PISA and PIEC, it is anticipated, will report to the
15 Commission at the July meeting.

16 I think it would be interesting for any of the
17 Commissioners who can spare the time on June 13, to come
18 to the meeting. I think you will hear things said that you
19 have not heard said before at the Commission meetings.

20 You might not agree with what you hear, but you will
21 hear a lot of different perspectives.

22 COMMISSIONER CARY: It will be held in this room?

23 MR. LEVINE: Yes.

24 COMMISSIONER KARPATKIN: I assume that those
25 two organizations -- and, through them, the participants in

1 the conference -- will have our committee reports?

2 MR. LEVINE: Yes. We told them that at the
3 meeting on Monday, I believe.

4 COMMISSIONER WEDGEWORTH: Can we have a transcript
5 of those discussions?

6 MR. LEVINE: There was not a transcript made.
7 We had a recorder going. It is not clear whether that will,
8 in fact, be transcribable. We tested it.

9 COMMISSIONER WILCOX: Would it be appropriate to just
10 briefly summarize what the different points of view were,
11 that were raised, that we have not heard?

12 MR. LEVINE: There was one point of view which was
13 made very strongly, which would seem to be concurred in by
14 a number of the participants. It was that Copyright
15 standards were a barrier to the dissemination of information;
16 and that abolishing the copyright -- at least in the computer
17 area, particularly -- might result in more creative effort.

18 There was a discussion -- there was some discussion --
19 of photocopying. It is difficult to summarize that.

20 There were a variety of opinions.

21 The variety came, in part, from the fact that
22 some of the people, in fact, produced their own publications
23 and were somewhat concerned about giving up copyright in
24 those entirely.

25 Others said, "We are happy to have anything that we

1 produced copied. We would be thrilled to have copied what
2 we have, and get it disseminated."

3 Very little -- very, very little -- was said about
4 computer programs, and in my little summary at the end, I
5 urged them to give some consideration to that, in anticipation
6 of the next meeting.

7 Mike, do you have anything?

8 MR. KEPLINGER: I don't think I have.

9 COMMISSIONER RINGER: May I ask what "satellite" means in that?

10 MR. LEVINE: Communications Satellite.

11 COMMISSIONER RINGER: Was that the thrust of the meeting?

12 MR. LEVINE: No. No. PISA, because of its
13 technological background, has contacts among a number
14 of public interest groups.

15 COMMISSIONER RINGER: They were assembling the groups
16 together?

17 MR. LEVINE: That is precisely it!

18 The next item is: Well, we have gotten this
19 report on proposals for the revision of Canadian Copyright
20 law, which you can have now; or we will send to you.

21 As you know, the Extension Bill passed the House
22 of Representatives. We don't anticipate any problem in the
23 Senate.

24 The President will then have to sign it and that,
25 I think, may be the only problem.

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1 COMMISSIONER CARY: Have you gotten any indication
2 that he may veto it?

3 MR. LEVINE: No, I have not.

4 COMMISSIONER CARY: He seems to be -- as I
5 understand it -- not very favorably impressed by Commissions.

6 MR. LEVINE: Exactly! Our final report will be
7 due July 31, 1978 under the extension bill.

8 COMMISSIONER HERSEY: Could I request that the
9 pages in the Canadian report with respect to computer programs
10 be circulated to the Commission?

11 MR. LEVINE: Yes. We have copies for everyone.

12 COMMISSIONER HERSEY: I commend these pages to you.

13 COMMISSIONER WEDGEWORTH: I think I have already
14 gotten a copy. It was appended to one of the reports we
15 got with the agenda.

MR LEVINE: The next item has to do with the dates for future meetings:
July 11 and 12, September 15 and 16, October 20 and 21, November 17 and 18, and
December 15 and 16. They are all scheduled for Thursday and Friday except July
which is a Monday and Tuesday due to conflicts.

JUDGE FULB: That seems to complete our agenda.

Is there anything more to be said by any Commissioner?

If there is nothing more to be said, then we will
recess until the July 11 session at 10:00 o'clock.

(Whereupon, the meeting was concluded.)

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